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## Binding Future Selves

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## Binding Future Selves

*Kaiponanea T. Matsumura\**

### ABSTRACT

*Courts traditionally treat a person entering an agreement as the same person at the time of enforcement notwithstanding the passage of time or an intervening change of mind. For certain agreements between intimates, however, courts have adopted the novel view that the enforcement of a person's earlier commitment would improperly constrain that person's will rather than serve as an expression of it. These cases rest on the assumption that an intervening change has created meaningful—and legally significant—differences between the later self (at the time of enforcement) and the earlier self (at the time of commitment) and that the later self deserves protection from the earlier self's choices.*

*This “different selves” rationale has arisen primarily in the context of agreements pertaining to matters such as embryo disposition, surrogacy, and parentage. Courts and commentators appear to believe that the centrality of these types of choices to personhood justifies exceptions to general contract principles. But even assuming that choices of this sort differ from choices embodied in “normal” contracts, the different selves rationale does not provide a principled basis for resolving a dispute between the selves; it does not explain why a choice central to personhood made at an earlier time is less central to that person than a choice made at a later time.*

*This Article contributes to the existing literature on several fronts. It reveals the increasing adoption by courts of the different selves rationale, which, until recently, was thought to be merely theoretical. It also exposes the ungrounded assumptions on which the rationale rests: that it applies only to a certain set of choices, that it can identify*

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*the proper choices to protect, and that it can actually protect those choices. Finally, this Article uses the different selves rationale as an occasion to examine the role of personal identity in contract law. Theories of personal identity emphasize the importance of self-continuity and future-regarding action, both of which are disserved by an approach that prizes a person's preference at the time of dispute rather than her earlier commitment.*

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## INTRODUCTION

The law of contracts is not sympathetic to regret. Indeed, the enforcement of commitments even after a promisor has come to regret her promises has been called “the very essence of contract.”<sup>1</sup> On certain matters of great personal significance, however, courts have second-guessed this well-established principle.

*A.Z. v. B.Z.*, which involved a couple’s fifteen-year saga to have biologically related children, exemplifies this departure.<sup>2</sup> For the first two years of their marriage, the couple experienced difficulty conceiving a child, and when the wife conceived, she suffered an ectopic pregnancy that necessitated the removal of one of her fallopian tubes.<sup>3</sup> Eight years passed during which the couple participated in a year’s worth of additional fertility treatments without success. Eleven years into their marriage, the couple turned to Gamete Inter-Fallopian Transfer—the simultaneous transfer of removed eggs and sperm into the fallopian tube—but this procedure resulted in a second ectopic pregnancy, destroying the wife’s remaining fallopian tube.<sup>4</sup> Left with few other options, the couple decided to pursue parenthood through in vitro fertilization.<sup>5</sup>

Before the first of their procedures, the fertility clinic presented the couple with a form entitled “Consent Form for Freezing (Cryopreservation) of Embryos,” on which they were asked to indicate the disposition of leftover frozen embryos upon certain listed contingencies, including separation or death.<sup>6</sup> The form prompted the couple to select the options “donated” or “destroyed,” but it also provided a blank line on which the couple could specify other

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1. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1247 (1998). See also Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 214 (1982) (observing that the “freedom to pursue individualization and diversity that characterizes private ordering” involves “yesterday’s legally binding private choice . . . overrid[ing] today’s contrary private choice”).

2. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1052–53 (Mass. 2000).

3. *Id.* at 1052, 1052 n.6 (explaining that an ectopic pregnancy is one that occurs outside the uterus).

4. *Id.* at 1053.

5. *Id.* The in vitro fertilization process includes the extraction of eggs from the intended mother, fertilization of eggs in a laboratory, implantation of one or more of the resulting embryos, and cryopreservation of any leftover embryos for later use. See *id.*

6. *Id.* at 1053–54. Specifically, the form listed the contingencies of “wife or donor reaching normal menopause or age forty-five years; preembryos no longer being healthy; one of us dying; [s]hould we become separated;” and “[s]hould we both die.” *Id.* at 1054 (internal quotation marks omitted).

preferences.<sup>7</sup> For the contingency, “[s]hould we become separated,” the wife, in the presence of her husband, wrote that the embryos should be “return[ed] to [the] wife for implant,” and she and her husband signed the form.<sup>8</sup> That first procedure was unsuccessful, but the couple tried several more times, with the husband signing a blank consent form thereafter and the wife filling out the form with identical language regarding their preferences in the event of their separation.<sup>9</sup> Finally, three years later, the wife conceived and gave birth to twins.<sup>10</sup> When the couple divorced several years after the twins’ birth, the wife sought judicial enforcement of the consent form over her husband’s objection in order to gain possession of the remaining four embryos for her use. The court held that under the circumstances, the parties did not enter into a binding agreement.<sup>11</sup> Remarkably, however, the court stated that “even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, [the court] would not enforce an agreement that would compel one donor to become a parent *against his or her will*.”<sup>12</sup>

By basing its decision on a disjunction between the husband’s will at the time of the legal dispute and his will memorialized in the earlier agreement, the court’s reasoning represents a novel departure from conventional contract principles. Contract law usually treats an agreement as the relevant manifestation of the will of the contracting parties and the resultant source of legal authority.<sup>13</sup> In determining the

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1053.

11. *See id.* at 1056–57 (noting that the record did not indicate that the parties intended the form to act as a binding agreement between them, as opposed to an agreement between them and the clinic; that the form lacked a duration provision, leading to the possibility of changed circumstances; and that the phrase, “[s]hould we become separated,” did not necessarily apply to a *divorce* proceeding). Other courts, interpreting similar consent forms, have concluded that the forms were definite enough to constitute an agreement between the spouses. *See In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003) (treating the consent form as an otherwise binding agreement but invalidating it on public policy grounds); *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) (enforcing a consent form as a binding agreement between the spouses).

12. *A.Z.*, 725 N.E.2d at 1057 (emphasis added).

13. *See, e.g., Omri Ben-Shahar & Ariel Porat, Preface to FAULT IN AMERICAN CONTRACT LAW xi* (Omri Ben-Shahar & Ariel Porat eds., 2010); Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1727 (2008) (observing that contract law may be

scope of the parties' legal obligations, courts look to the parties' assent at the time of the agreement and not afterwards: "The time for measuring a 'meeting of the minds' is the point of agreement, not performance."<sup>14</sup> Along those lines, courts interpret the agreement by determining the mutual intention of the parties at the time the contract was created, not at some other time.<sup>15</sup> In short, rights and obligations typically arise from a party's acts at the time of contracting; the law regularly allows the contracting self to bind his future self.

Intervening events, like a key individual's death or the destruction of a specific thing necessary for performance, sometimes excuse performance under the doctrine of impracticability.<sup>16</sup> But such events cannot do so if they were objectively foreseeable at the time of contracting.<sup>17</sup> The *A.Z.* court did not rely on the occurrence of unforeseen circumstances or mistaken assumptions by the husband about the state of affairs. Indeed, it would have been difficult for the husband to argue that the couple's separation was an unforeseen circumstance that relieved him of his commitment to surrender the frozen embryos to his wife given that the spouses indicated their preferences for the disposition of the embryos *if that very contingency arose*.<sup>18</sup>

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understood as an "act of self-legislation in which the parties create new legal obligations for themselves").

14. *Vaughan v. Tetzlaff*, 446 A.2d 356, 358 (Vt. 1982). *See also* *Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 724 N.E.2d 699, 703 (Mass. 2000) (noting that "to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a *present intention* to be bound by that agreement" (emphasis added)).

15. *See, e.g.*, *AIU Ins. Co. v. Super. Ct.*, 799 P.2d 1253, 1264 (Cal. 1990); *Evans v. Famous Music Corp.*, 807 N.E.2d 869, 872 (N.Y. 2004) ("It is well settled that our role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract."); *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002) ("The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern."). This inquiry is primarily objective, focusing on the words and conduct of the parties rather than their subjective intentions. *See* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427, 427 (2000).

16. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 261 (excusing performance due to unanticipated impracticability), 265 (excusing performance due to unanticipated frustration of purpose) (1981).

17. *See, e.g.*, *Karl Wendt Farm Equip. Co. v. Int'l Harvester Co.*, 931 F.2d 1112, 1120 (6th Cir. 1991) (noting that the doctrines of impracticability and frustration of purpose are "meant to fairly apportion risks between the parties in light of unforeseen circumstances").

18. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1054 (Mass. 2000).

The *A.Z.* court's decision to protect the husband from his subsequent, internal change of mind joins several other recent cases—involving agreements regarding the use of assisted reproductive technologies, parentage, and custody—in which courts have acted as if the person who made the promise is different in a legally significant way from the person against whom it is asserted such that enforcement would now be improper.<sup>19</sup> I call this novel defense to contract enforcement the “different selves rationale.”<sup>20</sup>

By questioning the legitimacy of holding a later self to an earlier self's commitments, courts have introduced skepticism about personal identity—how different selves connect over time, and whether a person remains the same despite inevitable changes that unfold<sup>21</sup>—into the realm of contract law. The acknowledgement of temporally different selves has significant implications for contract law in that it suggests a potentially potent reason not to hold a party to her earlier promises. Even more broadly, it challenges the ability of the law in multiple contexts to allocate benefits and impose punishment based on past actions. If differences between the selves are significant enough to relieve a person from her contractual commitments, similar differences may call into question the legitimacy of punishment for criminal acts committed by a former self. And what justifies paternalistic interventions—like anti-

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19. See *infra* Part I.C.

20. As I have noted in previous work, courts historically resisted enforcing intimate agreements based on traditional notions of family and gender that have begun to sound off-tune to modern ears. See Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 *YALE J.L. & FEMINISM* 159, 177–90 (2013) (criticizing a wide range of public policy rationales for non-enforcement). It is therefore possible that these courts have merely sought to dress up old public policy objections to the enforcement of intimate agreements in a more palatable package. It may also be the case that courts are actually uncertain about their authority to compel specific performance of acts called for by the agreements. See *infra* note 96 and accompanying text. At the risk of speculating about buried motives that will never come to light, see Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 *YALE L.J.* 1885, 1888 (1998) (“[C]ases unfortunately offer quite limited insight into the subjective motivations of their cast of characters.”); it is therefore possible that the courts' motivations reside not only in protecting the parties' later selves from their earlier choices, but also in some other place. But the fact remains that courts have at least nominally advanced a novel justification for refusing to enforce agreements that deserves examination on its own terms. And I will argue that, if anything, a more plausible explanation for the different selves rationale is not the desire to disguise old public policies as much as it is the courts' legitimate confusion about the prospect of enforcing personhood-defining commitments against later selves. *Id.* See *infra* Part II.A.

21. See *infra* Part I.A.

smoking ordinances—designed to make someone better off in the future? To recognize legally significant differences between the selves, as the courts adopting the different selves rationale have done, is to acknowledge the limits of the law to hold people accountable for their actions over time.

The fact that the different selves rationale has thus far only arisen in the context of intimate agreements suggests that the personhood-related aspects of the choices at stake, like becoming a legal or genetic parent, justify the exceptional treatment of intimate agreements.<sup>22</sup> The rationale for holding that the earlier self cannot bind the later self therefore has its roots in notions about what choices are central to personhood. In adopting a rationale that justifies non-enforcement based on differences between the selves, however, courts confuse questions of *personhood* with questions of *personal identity*. Questions of connection and persistence between past and present selves, which relate to personal identity, are conceptually distinct from questions about the centrality of past and present choices to the self and how the law should protect those choices.

A quick example illustrates this distinction. Which expression of B.Z.'s will regarding use of the cryopreserved embryos is more central to personhood: the earlier commitment he made to his wife that she could use the embryos if they separated, or his later desire that they be destroyed? The different selves rationale does not provide a reason to privilege the later preference over the earlier one given that the choices at both moments—involving reproduction—seem equally central to personhood. Courts embracing the different selves rationale clearly believe that the preference at the time of enforcement is the party's "true" preference, making enforcement of the earlier preference impermissible. But they offer no theoretical justification for this approach. This lack of justification is especially pressing because the adoption of an ex post perspective defeats the expectations of one of the parties to the agreement and may also limit the ability of all others to make important ex ante choices—like becoming parents through the use of assisted reproductive technologies—in future cases.

Only a few years before the *A.Z. v. B.Z.* case, E. Allan Farnsworth observed that internal changes almost never persuade courts to grant relief from earlier commitments, even when those

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22. The *A.Z.* court, for example, expressly referred to the choices at issue as pertaining to "personal rights of . . . delicate and intimate character." *A.Z.*, 725 N.E.2d at 1059 (citations and internal quotation marks omitted).



changes make one feel like a different person.<sup>23</sup> He spoke too soon. The emergence of the different selves rationale poses the vexing question whether and in what circumstances differences within the same person over time may prevent a person from binding his future self. And the different selves rationale answers that at least within the context of certain agreements regarding intimate subject matter, changes of preference over time can relieve a person of her contractual obligations.

My thesis is that theories of personal identity render the different selves rationale incorrect on both counts. In so arguing, I provide an extended analysis of the concept of personal identity in the contract law context.<sup>24</sup> Although the subject of personal identity has generated a lively scholarly debate outside the legal academy, legal scholars have largely ignored its role in contract law. I use existing theories of personal identity to examine and resist the assumptions about self-discontinuity raised by the different selves rationale. My argument proceeds in three parts.

In Part I, I document the surprising rise of the different selves rationale in the courts and trace its scholarly origins. In Part II, I argue both that the different selves rationale is internally inconsistent and that it cannot be confined to the intimate context. I show that the different selves rationale fundamentally departs from traditional assumptions about personal identity by granting people freedom from the decisions of previous selves and privileging current preferences without substantial justification. I also point out the absence of justifications for treating decisions related to intimate subject matter differently from other commitments reflected in binding agreements.

In Part III, I demonstrate how theories of personal identity undermine the assumptions on which the different selves rationale rests. Proponents of the different selves rationale have expressed skepticism regarding people's ability to identify with their previous choices and assimilate the choices into a broader understanding of their lives. This skepticism, I argue, raises concerns addressed by narrative identity theory, which suggests that a person can integrate a wide range of experiences into a self-narrative that provides both coherence and persistence over time. Together with other theories of personal identity, narrative identity theory refutes assumptions about discontinuity and demonstrates that efforts to protect the self by privileging preferences at the time of the legal dispute are

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23. See E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 26 (1998) (noting that the possibility that a "person may evolve into a 'later self'" "has had no significant impact on the courts").

24. I discuss the lack of scholarly attention paid to this issue in Part I.B., *infra*.

misguided. I conclude that if courts wish not to enforce the agreements at issue, they must locate a different rationale.

### I. CHANGED PREFERENCES, CHANGED SELVES?

We instinctively recognize that our choices, from the trifling to the profound, say something about ourselves. Certain choices—“relating to marriage, procreation, contraception, family relationships, child rearing, and education”—are sufficiently “central to personal dignity and autonomy” that the Supreme Court has seen fit to protect them from state interference.<sup>25</sup> Though the state cannot regulate many personhood-constitutive choices, people sometimes *seek* the state’s involvement by entering into agreements that they intend to be legally binding.<sup>26</sup> That is because the choices at issue, although intensely personal, often involve the participation of other intimates and because the decision-makers desire some certainty about the consequences of their choices before they commit.<sup>27</sup>

Courts and scholars have struggled to make sense of judicial involvement in this private legal space. On the one hand, it seems inherent in choices of a constitutional stature that courts must respect a person’s commitments regarding them. But when that person’s preferences have changed, courts must struggle with the consequences of holding the person to his earlier commitments, even if they were initially his to make. This dilemma raises questions about the continuity and identification between selves over time.

In this Part, I will define the concept of personal identity and examine how contracts scholars and courts have engaged it. That backdrop will serve to demonstrate how the different selves rationale expresses a novel identity-skepticism within the contract context.

#### A. Defining Personal Identity

Although the phrase “personal identity” is not susceptible to a single definition, I use the term here to refer to that which “makes

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25. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

26. Parties have sought to enter binding prenuptial and postnuptial agreements, agreements governing gamete donation and the use of in vitro fertilization, agreements to serve as a parent or to avoid legal parentage, and agreements to raise children in a certain religion or in a certain geographic area, to name a few.

27. *See, e.g.,* Matsumura, *supra* note 20, *passim* (discussing the importance of contracts governing the use of assisted reproductive technologies in securing the expectation of the parties); Scott & Scott, *supra* note 1, at 1232, 1255 (noting the importance of contract law in protecting the parties expectations in the context of marriage).

one the person one is,” “unique as an individual and different from others.”<sup>28</sup> Theories of personal identity address the question of what it means for a person to persist over time, such that it is possible for a person in the present to identify with past and future versions of herself.<sup>29</sup> What, for example, allows a person to point to a photograph of a child and say, “That’s me,” or enables a person taking actions like quitting smoking to believe she is benefiting a future version of herself rather than a different person? Implicit in these questions is the notion that a person may change in certain respects from time to time and that either that person or others may feel the need to identify or connect the selves at both points in time.<sup>30</sup> A successful theory of personal identity will answer these questions, grounding concepts of moral responsibility and self-regarding action in the process.<sup>31</sup>

For centuries, philosophers have attempted to answer these questions, both in terms of identification—how to tell whether some present object is the same as a past object—and constitution—specifying the necessary and sufficient conditions for personal identity.<sup>32</sup> Broadly speaking, the existing approaches depend on either some sort of psychological continuity or biological and physical continuity. Adherents to the psychological approach believe that chains of psychological features—such as beliefs, memories, preferences, rational thoughts, and desires—connect a being over time.<sup>33</sup> The psychological approach accords with characteristics about the self that people value and commonly associate with their identity, like their thoughts and memories. But

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28. Eric T. Olson, *Personal Identity*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2010), available at <http://plato.stanford.edu/archives/win2010/entries/identity-personal/>, archived at <http://perma.cc/8BXX-KTRN>.

29. See *id.*; David Shoemaker, *Personal Identity and Ethics*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2012), available at <http://plato.stanford.edu/archives/spr2012/entries/identity-ethics/>, archived at <http://perma.cc/PWM2-JUWN>.

30. Some psychologists have drawn a sharp distinction between the concepts of “self” and “identity,” with “self” referring to “both the subjective sense of ‘I’ and the objective sense of ‘me[,]’” and “identity” referring to the “way that the I begins to *arrange or configure* the me[,] . . . provid[ing] life with some semblance of psychosocial *unity and purpose*.” Dan P. McAdams, *The Redemptive Self: Narrative Identity in America Today*, in THE SELF AND MEMORY 95, 99 (Denise R. Beike, James M. Lampinen, & Douglas A. Behrend eds., 2004) (first emphasis added).

31. See Shoemaker, *supra* note 29. I will elaborate on these theories in Part IV.A., *infra*.

32. See MARYA SCHECHTMAN, THE CONSTITUTION OF SELVES 7–8 (1996).

33. See DAVID DEGRAZIA, HUMAN IDENTITY AND BIOETHICS 13–22 (2005); Olson, *supra* note 28; Shoemaker, *supra* note 29.

it struggles to explain why we might think of a person in a permanent vegetative state as the same as the previously-active version of the person rather than a different person entirely. The biological approach responds to this challenge by emphasizing the importance of the physical body (or biological organism) in providing persistence over time.<sup>34</sup> Philosophers have long argued about the validity of these approaches. But even philosophers who contend that no theory can fully explain the concept of identity agree that some relation must connect different selves over time.<sup>35</sup> It is on that common ground that this Article rests.

The preoccupation with personal identity extends beyond the realm of philosophy. As literary critic Peter Brooks has pointed out, the question of “[w]ho you are—in the sense of what you can legitimately call yourself, and what others call you”—became a societal and legal preoccupation in the nineteenth century.<sup>36</sup> The quest for self-knowledge was one aspect of this preoccupation; the desire to discipline and punish was another.<sup>37</sup> Indeed, perhaps the most salient purpose that personal identity serves in the law is justifying the imposition of punishment for past acts.<sup>38</sup> Punishment, however, is just the tip of the iceberg. Any time the law seeks to deter or incentivize action, or impose consequences for past behavior, it does so based on assumptions of personal identity: a sufficient relation between multiple selves.<sup>39</sup> For if I was a different person yesterday than I am today and I will be tomorrow, I could not plan for my future or suffer the consequences of acts committed in the past.

The law, then, generally assumes the existence of a continuous personal identity whatever the precise theory that justifies it.<sup>40</sup> For the remainder of this Article, I will refer to the law’s general

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34. See DEGRAZIA, *supra* note 33, at 46–51; Olson, *supra* note 28; Shoemaker, *supra* note 29.

35. See DEREK PARFIT, REASONS AND PERSONS 313–20, 325 (1984) (noting the presence of some relation between temporally distinct selves); Shoemaker, *supra* note 29.

36. PETER BROOKS, ENIGMAS OF IDENTITY 4 (2011).

37. *See id.*

38. *See, e.g.*, Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395 (1990) (considering the importance of personal identity to criminal theories of retribution, deterrence, incapacitation, and rehabilitation).

39. *See id.* at 412, 419–20; Lawrence Zelenak, *Tax Policy and Personal Identity Over Time*, 62 TAX L. REV. 333 (2009) (noting the impact of personal identity on how one assesses the distributional effects of tax policy).

40. *See* Dresser, *supra* note 38, at 427–35 (arguing both that the law imposes consequences based on conceptions of personal identity and excuses acts in situations where personal identity might come under question (based on incapacity, lack of memory, etc.)).

embrace of a continuous view of personal identity as the “generic view” to distinguish it from the other, more specific, approaches to personal identity discussed above.

*B. Scholarly Foundations of the Different Selves Rationale*

For the most part, existing scholarly accounts of contract law have not devoted much attention to how personal identity affects the enforceability of agreements.<sup>41</sup> When concerns regarding cognitive limitations or multiple selves in contracting have arisen at all, those concerns have tended to focus on increasing the efficiency of contracting practices, not relieving parties of their contractual obligations.<sup>42</sup> Although the dilemma that arises when a court enforces

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41. Scholars recognizing contract law’s importance in allowing people to satisfy their individual interests have largely accepted the generic view of personal identity without question. Both law-and-economics and philosophically minded scholars, for instance, presume an autonomous decision maker who may benefit from or be morally obligated to perform his promises. The questions of how contract law can facilitate the enforcement of economically efficient private exchanges and discourage inefficient exchanges, or how it interacts with concepts of moral agency, assume an autonomous decision-maker who is meaningfully connected across time. *See generally* CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); Richard Craswell, *In that Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 *YALE L.J.* 903, 906 (2003) (identifying the value of efficiency as the concern of most mainstream law and economics scholarship); Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 *PHIL. REV.* 481, 517 (2008) (discussing how the ability to make binding promises is essential to the creation of meaningful personal relationships). There have been a few instances in which scholars in other fields have noted the impact that a changed, or multiple-selves view, would have on criminal punishment, *see, e.g.*, Dresser, *supra* note 38, *passim*, or marriage, *see, e.g.*, Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 *VA. L. REV.* 9, 58–62 (1990) (suggesting that the concept of multiple selves might undermine the viability of precommitment devices in the marital context).

42. A rich body of scholarly work incorporates findings of cognitive psychologists and behavioral economists regarding the limits of parties to accurately predict their future preferences or to reflect their “real” preferences in the terms of an agreement. *See, e.g.*, Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *STAN. L. REV.* 211 (1994) (identifying cognitive limitations and analyzing their effect on contract law); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 *U. CHI. L. REV.* 1203 (2003) (considering the implications of bounded rationality on the enforcement of terms in form contracts); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 *CALIF. L. REV.* 1051 (2000) (examining how various findings from the behavioral sciences regarding heuristics and biases, the effect of bargaining context, and deviations from self-interested behavior affect the assumption of rational decisionmaking); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and*

a commitment made by a previous self in order to bind an unwilling later self has not escaped notice,<sup>43</sup> the scholars tend to assume a sufficient level of connection to justify enforcement of agreements.<sup>44</sup> Judge Richard Posner, for example, has argued from an instrumental perspective that the law must view the selves as connected in order to “promote[] social welfare overall by maintaining socially valuable institutions, such as contract and criminal punishment.”<sup>45</sup> In short, these scholars embrace the generic view of personal identity.

A few scholars, however, have argued that differences between the selves over time should, at least in some circumstances, relieve the later self from the earlier self’s commitments. Anthony Kronman has provided one of the leading accounts of this argument in his classic article, *Paternalism and the Law of Contracts*.<sup>46</sup> Because his contentions underlie and explain the different selves rationale, I will deal with Kronman’s arguments at some length here.

Kronman notes that every contracting situation gives rise to the possibility that one may make mistaken assumptions about the state of affairs, such that he will miss an expected benefit. Although this miscalculation might cause disappointment, the

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*Implications for Liberty*, 106 NW. U. L. REV. 1033, 1037–41, 1054 (2012) (providing a more recent summary of the development of the behavioral economics literature in the legal academy). In a sense, this literature expresses some degree of skepticism about the connection of the selves over time given the problem that individuals might have at Time<sub>1</sub> predicting how they will feel about a commitment at Time<sub>2</sub>. This body of work, however, generally focuses on the problems from an ex ante perspective—should we be skeptical about certain types of commitments at the outset?—rather than an ex post perspective—should we relieve a party of a commitment that he *already made*? The different selves rationale differs from this body of work in that it adopts the ex post rather than ex ante perspective.

43. Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 LEGAL THEORY 23, 23 (1997); John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 997 (2001) (noting that the later self could argue he was not present for the earlier negotiation).

44. See, e.g., Posner, *supra* note 43, at 24, 34.

45. *Id.* at 34.

46. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983). To date, this article has been cited in over 250 law review articles, some of which, in turn, have been cited by courts advancing the different selves rationale. See, e.g., *J.B. v. M.B.*, 783 A.2d 707, 715, 719 (N.J. 2001) (citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 88 (1999)).

promisor will often understand his contract as a rational venture given what he knew at the time he made the contract.<sup>47</sup>

However, Kronman argues that “[i]f [the promisor’s] goals change, the contract may lose its original attractiveness and become pointless (or even reprehensible) from [his] point of view, despite the fact that all his assumptions about the world have proven accurate.”<sup>48</sup> A goal change—Kronman provides religious conversion as an example—results in *regret* rather than *disappointment*.<sup>49</sup> As a result of the change, the original framework within which he assessed the rationality of his previous decisions no longer persists, undermining his confidence in the rationality of his choices.<sup>50</sup> Although it is sometimes possible to think outside the framework of one’s current goals, a “more radical” shift weakens a person’s ability to “review sympathetically” his past decisions.<sup>51</sup> This disconnect renders the previous decisions irrational and senseless, resulting in a feeling of demoralization.

But demoralization does not necessarily counsel against all forms of contract enforcement. Kronman notes that this justification, based on the concept of personal integrity, comes into play most strongly in the context of specific performance of personal services contracts. Such contracts, if enforced, would compel performance against the promisor’s will, leaving him no choice but to act against his wishes in the manner promised, thereby resulting in a form of self-enslavement.<sup>52</sup> Although damages might still engender some regret, performance intensifies those feelings by reminding the promisor of the continuing influence of his former goals in his life.<sup>53</sup>

Kronman’s theory is based on several assumptions touching on personal identity. First, he believes it possible for a promisor’s goals to change so substantially that the change renders previous decisions irrational to the promisor. Second, the change in goals can be so significant that it also leaves the promisor unable to empathize with (or “understand the meaningfulness” of) his previous choices.<sup>54</sup> Third, this change in goals will render his previous choice “demoralizing” in such a way that he may lose “confidence in his ability to make lasting commitments and guard

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47. Kronman, *supra* note 46, at 780.

48. *Id.*

49. *See id.*

50. *Id.* at 780–81.

51. *Id.* at 781.

52. *Id.* at 778–79.

53. *See id.* at 783.

54. *Id.* at 781.

the things he cares for.”<sup>55</sup> And finally, the previous decision will remain a “foreign element” in the promisor’s life.<sup>56</sup>

The inability of a person to integrate certain past choices into her current framework creates a problem of self-identification. Taken to their logical extreme, Kronman’s assumptions could suggest that personal identity is discontinuous enough to prevent holding a person responsible for earlier commitments. But he does not appear to go that far: by limiting his theory to specific performance of personal services contracts and allowing for the imposition of damages, he appears to suggest that some degree of responsibility—and therefore continuity—persists despite a person’s change in goals.<sup>57</sup> In sum, although Kronman’s arguments challenge the generic view of personal identity, his refinements to the theory remain unclear.

Following in the wake of Kronman’s article, several scholars have also challenged the generic view of personal identity. Their arguments primarily arise in the context of agreements for the use of assisted reproductive technologies because of the sensitive and far-reaching nature of personal commitments in that area.

Carl Coleman, for example, has argued that agreements for the disposition of cryopreserved embryos created in the in vitro fertilization process should not be enforced because those agreements—which typically give frozen, fertilized embryos to one of the two individuals who contributed genetic material, or designate that the embryos shall be donated or destroyed—do not protect an individual’s right “to make decisions consistent with [his or her] contemporaneous wishes, values, and beliefs.”<sup>58</sup> Coleman suggests that decisions made before undergoing the IVF process may seem like those of a “completely different person” at the time a dispute arises due to intervening life changes.<sup>59</sup> Like Kronman, Coleman recognizes that the law generally disregards mere changes of heart as an excuse to perform a contractual obligation.<sup>60</sup> But Coleman does not point to a shift in *goals* as the

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55. *Id.* at 782.

56. *Id.*

57. It is possible to interpret Kronman’s argument as not even applying to all personal services contracts but only those in which a promisor’s goals have changed. A person might not want to work for a particular employer because a better offer has materialized, but might retain the same goal of making money. It is unclear whether Kronman views his theory as applying to such a situation.

58. Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 88 (1999).

59. *Id.* at 91.

60. *Id.* at 92.



justification for his deviation from the norm of enforcement. Instead, he points to the fact that the law has traditionally treated certain types of choices (related to reproduction or familial relationships) as inalienable.<sup>61</sup> The shortcoming of this approach is that the judicial decisions on which he relies say nothing about when internal changes should relieve a party of her own previous commitments. Critics of surrogacy agreements based on the idea of changed selves often commit a similar oversight: relying on intuitions about the nature of reproductive decisions to advocate for non-enforcement but not considering what those intuitions imply about personal identity.<sup>62</sup>

In sum, contracts scholars have largely avoided developing a full account of how personal identity relates to the enforceability of agreements, implicitly endorsing the generic view. But a few scholars have laid the groundwork for judicial decisions that, at least in some circumstances, refuse to enforce agreements based on differences between the selves.

### C. *The Rise of the Different Selves Rationale in the Courts*

Through the years, courts have sometimes refused to enforce agreements, especially those involving the use of assisted reproductive technologies, on public-policy grounds.<sup>63</sup> The justifications proffered by the courts have changed over time to reflect different judicial conceptions of harm to the public that

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61. See *id.* at 92–95. As I will argue below, Coleman’s argument is internally inconsistent. The decision to treat certain choices as inalienable because they are central to personhood implies the existence of a continuous personal identity. Otherwise, the infringement of those choices would not cause harm to a person that would be long-lasting or engender regret. But if a continuous personal identity exists, then he must provide a theory for when and how a change in the self would justify relieving a person of his contractual obligations.

62. See, e.g., Jennifer Gerarda Brown, *The “Sophie’s Choice” Paradox and the Discontinuous Self: Two Comments on Wertheimer*, 74 DENV. U. L. REV. 1255, 1256 (1997) (“The process of carrying and giving birth to a child so fundamentally changes a woman—physically, emotionally, and socially—that her very identity may change. . . . Because of this discontinuity of identity, the pre-pregnant woman cannot bind the mother.”); Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L.J. 1811, 1818–19 (1988) (pointing to the “changes in feeling that we know frequently occur, and that we generally want to occur, during pregnancy and at birth”); Stephen G. York, *A Contractual Analysis of Surrogate Motherhood and a Proposed Solution*, 24 LOY. L.A. L. REV. 395, 419 (1991) (claiming that surrogate mothers are “unable to critically evaluate what their own desires and interests will be after the child is born”).

63. See Matsumura, *supra* note 20, at 178–90.

would result from enforcement.<sup>64</sup> The refusal to enforce an agreement based on perceived differences between selves of the same party over time, however, breaks new ground as the following discussion will demonstrate.

Recall that in the *A.Z. v. B.Z.* case, the Massachusetts Supreme Judicial Court refused to enforce an agreement between the spouses that gave control of cryopreserved embryos to the wife in the event of the couple's separation because to do so would compel a person to become a parent "against his or her will."<sup>65</sup> That rationale has been extended in several other cases.

In *J.B. v. M.B.*,<sup>66</sup> former spouses asked the New Jersey Supreme Court to resolve a dispute over the possession and use of cryopreserved embryos that the parties created during the IVF process. In the case, a couple with fertility problems entered into a written agreement with a fertility clinic in March 1995, stating that "all control, direction, and ownership of our tissues will be relinquished to [the clinic]" following "dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues."<sup>67</sup> In May 1995, the IVF procedure was carried out, resulting in the creation of eleven embryos, seven of which were cryopreserved.<sup>68</sup> The wife, J.B., became pregnant and gave birth to the couple's daughter in March 1996. Within six months, though, the couple's marriage unraveled, and J.B. told her husband that she wanted the remaining embryos discarded. The parties' legal dispute centered on what would happen to the remaining embryos: M.B. sought an order compelling J.B. to either implant the embryos or allow their donation to infertile couples.<sup>69</sup> He averred that the couple had come to an oral agreement before undergoing the IVF process that any unused embryos would be used or donated, a position consistent with his religious beliefs.<sup>70</sup> J.B., on the other hand, claimed that the decision to use IVF was "made during a time when defendant and I were married and

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64. In *In re Baby M*, 537 A.2d 1227 (N.J. 1988), for example, the New Jersey Supreme Court listed a number of harms that could result from the enforcement of a surrogacy contract: "the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct." *Id.* at 1250.

65. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000).

66. 783 A.2d 707 (N.J. 2001).

67. *Id.* at 710.

68. *Id.*

69. *Id.*

70. *Id.*

intended to remain married” and “planned to raise a family together as a married couple.”<sup>71</sup> She asserted that she and her husband never discussed what to do with remaining embryos if the marriage dissolved.<sup>72</sup>

The *J.B.* court first considered whether the parties entered into a binding agreement for the disposition of the cryopreserved embryos. The case essentially presented the court with several options: it could either look to the written consent form executed by both spouses with the clinic; conclude that the parties entered into an oral agreement as urged by M.B.; or conclude, contrary to the existence of the written form, that the parties never discussed what to do with the embryos if they divorced, as J.B. had claimed. The consent form required both spouses to express their preferences about what steps the clinic should take if the parties were to divorce, but that clause “carve[d] out an exception that permit[ted] the parties to obtain a court order directing disposition of the preembryos.”<sup>73</sup> The court concluded that this language was too conditional and ambiguous to control.<sup>74</sup> Moreover, the court rejected M.B.’s assertion that the parties reached an oral agreement, holding that any agreement for the disposition of embryos would have to be “formal, unambiguous [as to] the parties’ intentions,” and in writing.<sup>75</sup>

The court went on to hold that even if the parties had entered into an unambiguous written agreement, their contractual freedom would be limited in several respects. It recognized that the decision at stake implicated interests of a constitutional magnitude and was therefore “theirs to make.”<sup>76</sup> But it implicitly rejected the notion that the parties’ prior choices mattered if they later reconsidered:<sup>77</sup> notwithstanding the fact that the clinic’s consent form asked parties to specify their preferences *if they divorced*, the court reasoned that “at the point when a husband and wife decide to begin the in vitro fertilization process, they are unlikely to anticipate divorce or to be concerned about the disposition of preembryos on divorce.”<sup>78</sup>

Responding to the differences between the pre-divorce and post-divorce selves, the court held that enforcement of an embryo disposition agreement preventing a party from reconsidering a

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71. *Id.*

72. *Id.*

73. *Id.* at 713.

74. *Id.* at 713–14.

75. *Id.* at 714.

76. *Id.* at 715.

77. *Id.* (focusing on the problem of later disagreement).

78. *Id.*

previous commitment would violate public policy.<sup>79</sup> The court expressed concern that “forc[ing]” a person “to become a biological parent *against his or her will*”<sup>80</sup> “could have life-long emotional and psychological repercussions,”<sup>81</sup> echoing Anthony Kronman’s concerns about demoralization.<sup>82</sup> The court therefore held that it would enforce cryopreservation agreements “subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos.”<sup>83</sup>

This decision departs from a traditional contract approach: enforcing an agreement only as long as the parties voluntarily perform their obligations essentially amounts to a rejection of the understanding of a contract as a binding agreement.<sup>84</sup> This is especially the case where the parties are allowed not to perform based on their internal change of mind.<sup>85</sup>

The justifications for this departure implicate two key aspects of the generic view of personal identity. First, the New Jersey Supreme Court expressed suspicion about the ability of parties to predict their preferences in the realm of childrearing and to anticipate the effect of contingencies like divorce, even if prompted by terms in the agreement. In other words, it doubted the ability of parties to be self-regarding, at least in the area of procreational decision-making.<sup>86</sup> Second, the court questioned the extent to which a person could be held accountable for his or her prior decisions. By pitting a person’s “earlier acquiescence”

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79. *Id.* at 718. I criticize the court’s reliance on public policy at length in a previous work. See Matsumura, *supra* note 20, *passim*.

80. *J.B.*, 783 A.2d at 718 (emphasis added).

81. *Id.* at 717. The court’s concern about emotional and psychological repercussions suggests its belief that a party’s change of position in these circumstances will be genuine, substantial, and not based on strategic opportunism or the bare desire to harm the other.

82. See *supra* notes 49–53 and accompanying text; see also Kronman, *supra* note 46, at 782–83.

83. *J.B.*, 783 A.2d at 719.

84. See, e.g., Recent Cases, *Family Law—Contract—Supreme Court of New Jersey Holds That Preembryo Disposition Agreements Are Not Binding When One Party Later Objects*, 115 HARV. L. REV. 701, 704 (2001) (“Because mere disagreement by either party vitiates the contract in favor of balancing the procreative rights of the parties, there is really no contract.”). On the other hand, the court could have gone further and made the agreement itself illegal. See, e.g., Todd D. Rakoff, *Is “Freedom from Contract” Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, 477 (2004) (noting that on the extreme end of the spectrum of contract enforcement are agreements that cannot even be made without violating the law).

85. See FARNSWORTH, *supra* note 23, at 26 (noting that courts have generally been unsympathetic to internal changes of mind).

86. *J.B.*, 783 A.2d at 715.

against his “subsequent[] reconsider[ation],” the court drew a line between the selves, setting up a situation in which it would have to choose which self to privilege.<sup>87</sup> And by refusing to force a party “to become a biological parent against his or her will,” it sided with the current self.

We see these concerns reflected in several other judicial opinions resolving embryo disposition disputes. In *In re Marriage of Witten*,<sup>88</sup> the Iowa Supreme Court also refused to enforce a clinic consent form in which the parties indicated their preference for the disposition of embryos. The spouses, Tamera and Trip, had specified that the clinic could only release or dispose of embryos with the signed approval of both spouses.<sup>89</sup> Unlike the New Jersey Supreme Court, the Iowa Supreme Court treated the consent form as an otherwise valid agreement between the parties.<sup>90</sup> But it similarly rejected a contractual approach to the dispute, citing Professor Coleman’s argument that “individuals are entitled to make decisions consistent with their contemporaneous wishes, values, and beliefs.”<sup>91</sup> Based on this view, the court held that embryo disposition agreements would only be enforceable between the progenitors as long as they did not change their minds and that embryos would remain cryopreserved unless and until such a change of mind occurred.<sup>92</sup>

Self-continuity-based concerns affect the enforceability of other types of agreements as well. The Massachusetts Supreme Judicial Court invalidated an agreement by a woman to co-parent her former partner’s child based on its “reluctance to . . . bind individuals to future family relationships.”<sup>93</sup> Implicit in the fear of “binding” a person is the assumption that the person does not wish to be bound; but that person is only unwillingly bound in the future

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87. *Id.* at 718.

88. 672 N.W.2d 768 (Iowa 2003).

89. *Id.* at 772.

90. *Id.* at 773.

91. *Id.* at 777 (quoting Coleman, *supra* note 58, at 88–89).

92. *Id.* at 783. Interestingly, the Iowa Supreme Court held that the agreements would be fully enforceable by the fertility clinics, notwithstanding the parties’ inability to enforce the agreements against each other. *See id.* at 782. Virtually all clinics only agree to store embryos for a certain length of time. The Iowa Supreme Court therefore created a default rule favoring destruction of the embryos in most circumstances.

93. *T.F. v. B.L.*, 813 N.E.2d 1244, 1250 (Mass. 2004). The nonmarital status of the partners no doubt mattered a great deal here. The state of Massachusetts apparently has no problem authorizing the voluntary adoption by a stepparent, nor would it appear to hesitate to impose parental obligations upon that stepparent. *See MASS. GEN. LAWS* ch. 210, § 1 (2014) (setting forth the grounds and procedures of adoption).

if his or her earlier consent is not legally significant. Likewise, a Pennsylvania court refused to enforce a prenuptial agreement specifying that all of the couple's children would be raised in the Jewish faith.<sup>94</sup> The court noted that it would be difficult for an interreligious couple to “project themselves into the future” in order to predict how they would feel about the raising of their children and that the subject matter of the agreement would infringe “[t]he constitutional freedom to question, to doubt, and to change one's convictions.”<sup>95</sup>

To be sure, there are other concerns at work in these decisions, and the courts' discomfort with available remedies is prime among them.<sup>96</sup> But these decisions all explicitly rest on differences between the selves over time that the courts have treated as legally relevant. In so doing, these decisions reveal that concerns about self-continuity have gained purchase with the courts, even though the courts' conceptions of personal identity are often hazy at best.

In the next Part, I will argue that courts do in fact see the different selves rationale as a viable solution to the problems posed by intimate agreements. I will simultaneously investigate whether the different selves rationale presents a plausible alternative theory of personal identity in the contract context.

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94. *Zummo v. Zummo*, 574 A.2d 1130, 1141 (Pa. Super. Ct. 1990). *See also, e.g.*, *Weiss v. Weiss*, 49 Cal. Rptr. 2d 339 (Ct. App. 1996) (involving a similar holding on a similar type of agreement).

95. *Zummo*, 574 A.2d at 1146–47. The *Zummo* court arguably offers a slightly different argument against enforcement based not on a disjuncture between selves, but on the fact that religious beliefs are expected to change in a “lifelong dynamic process.” *Id.* at 1146. Such a rationale could depend more on the religious matter than views of the self. Nevertheless, the court's decision shares the notion that the generic view of personal identity does not suffice to hold a person to his earlier commitments.

96. *See, e.g., T.F.*, 813 N.E.2d at 1251 (expressing concerns about “direct enforcement” of personal choices related to becoming a parent (internal citation omitted)); *Witten*, 672 N.W.2d at 781 (noting the court's historical “reluctance to become involved in intimate questions inherent in personal relationships” because of problems with “enforcement”); *In re Baby Boy C.*, 638 N.E.2d 963, 967 (N.Y. 1994) (declining to enforce a consent to adoption on the ground that it would be difficult to order “faithful performance of such contracts”). In the *Zummo* case, the court was troubled both by the vagueness of the childrearing agreement and of concerns that interpretation of the agreement would lead to entanglement with religious decision-making in violation of the First Amendment. *See Zummo*, 574 A.2d at 1144–46.

## II. A CRITICAL EXAMINATION OF THE DIFFERENT SELVES RATIONALE

In this Part, I explore the assumptions on which the different selves rationale rests in order to demonstrate more fully what is at stake in the decision to reject the generic view of personal identity.<sup>97</sup> By demonstrating the extent of the departure, this Part will ultimately enable a better understanding of the role we expect personal identity to play in contract law.

The different selves rationale of personal identity has significant implications for contract law. Treating a contractual commitment not as the expression of a person's will but rather as the binding of a later self, the legitimacy of which may be questioned, opens up all agreements to scrutiny.<sup>98</sup> Courts advancing the different selves rationale appear to assume that the rationale would only apply to certain intimate agreements. But the implications of their position sweep broadly, especially in the following three respects: (1) they question a person's ability to make future commitments; (2) they vastly extend freedom of choice beyond the protection of the circumstances in which choices are made to reconsideration of the choices themselves; and (3) they privilege preferences at the time of the legal dispute over preferences either prior to or after the dispute is resolved.

### A. Future Commitments and Alienability

Proponents of the different selves rationale have largely limited this rationale against contract enforcement to a class of "emotional"<sup>99</sup> or "delicate and intimate"<sup>100</sup> decisions related to matters of the family<sup>101</sup> or freedom of conscience.<sup>102</sup> This category

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97. I acknowledge that the generic view of personal identity also reflects certain assumptions or value judgments. Just because that view is "generic" does not mean it is not ideological. Rather, the assumptions raised by the different selves rationale should cause us to question how firmly we should adhere to the generic view, and whether aspects of that view require revision.

98. A different selves rationale therefore creates a line-drawing challenge: Is a changed preference always the preference of a different self? And does the fact of a different self always excuse performance under an agreement or only in conjunction with certain types of choices?

99. *Witten*, 672 N.W.2d at 781; *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001).

100. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (citation and quotation marks omitted).

101. See, e.g., *Witten*, 672 N.W.2d at 781 ("marital and family relationships"); *J.B.*, 783 A.2d at 719 ("family relationships"); *A.Z.*, 725 N.E.2d at 1059 ("familial relationships (marriage or parenthood)").

of choices closely tracks those that the Supreme Court has found to reside in the liberty and privacy protections of the Due Process Clause.<sup>103</sup> The assumption that choices pertaining to the family or intimate conduct—such as whether to get married or divorced, to engage in sexual conduct, or to have or give up children—are entitled to different treatment from other types of choices is not novel. Some have responded by taking the position that these intimate choices should be the subject of a rule prohibiting their transfer on the market;<sup>104</sup> others have suggested prophylactic or protective rules to prevent improvident decisions.<sup>105</sup> The different selves rationale differs in its reasoning and prescriptive solutions from these other legal issues but shares their line-drawing challenges.<sup>106</sup> That is to say, it struggles to explain why people would be free to make certain choices in advance—like spousal support provisions in prenuptial agreements—but not others—like the use of cryopreserved embryos.<sup>107</sup>

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102. *Zummo v. Zummo*, 574 A.2d 1130, 1141 (Pa. Super. Ct. 1990) (involving the freedom to choose the religious upbringing of one's children).

103. See Coleman, *supra* note 58, at 95–96 (arguing that reproductive decisions are inalienable and noting that “most decisions about these matters are constitutionally protected”); see also *J.B.*, 783 A.2d at 716–17 (noting the constitutional dimension of the choices at issue).

104. See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1906 (1987) (proposing a market-inalienability rule for choices “integral to the self,” such as choices pertaining to “politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes”); Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 209–10 (2012) [hereinafter Rothman, *The Inalienable Right*] (arguing that certain constitutional rights are inalienable and that the right of publicity should fall within those protections).

105. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 158–59 (2007) (prohibiting certain abortion methods to protect women from the regret they could experience upon finding out how their fetuses were terminated).

106. Critics of Professor Radin's anti-commodification view note the difficulties her theory faces in determining exactly which commodities should be market-inalienable. See, e.g., MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 26–27 (1993) (noting that Radin's own proposed approach requires a “case-by-case” determination of when the subject of a transaction would be too central to personhood to be commodified and that it ultimately raises empirical questions that her theory cannot answer). Professor Rothman has likewise acknowledged that relying on the Supreme Court's category of “fundamental rights” to determine what an individual can properly alienate is somewhat indeterminate. See Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 503–07 (2010).

107. The act of drawing lines between the intimate and non-intimate realms is fraught with challenges. For example, Benjamin Means has called attention to the prevalence of family-owned businesses and the complicated interplay



But the difficulty of cabining the different selves rationale extends beyond the indeterminacy of the category of marriage and the family. A further problem with this limitation is that it fails to explain why choices that people make all the time notwithstanding their emotional nature cannot be the subject of advance agreement. People make unilateral choices not to procreate by choosing abstinence, birth control, or abortion.<sup>108</sup> Some such choices, like sterilization, are common and irreversible and are performed notwithstanding the possibility of later regret.<sup>109</sup> People also make decisions regarding sex and reproduction involving others by consenting to sexual contact—in essence waiving or transferring the right to be free from unwanted contact or bodily invasion<sup>110</sup>—or engaging in sexual behavior with the understanding that it could result in the birth of a child.<sup>111</sup> The law generally treats these decisions as valid absent exceptional circumstances like coercion or duress.<sup>112</sup> The nature of these choices, then, does not render them fully inalienable.<sup>113</sup> The rights at stake—e.g., to engage in

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between the economic and domestic functions of those businesses, as well as the uncertain overlay between family law and corporate law when dealing with governance disputes. See Benjamin Means, *The Contractual Foundation of Family-Business Law*, 75 OHIO ST. L.J. (forthcoming 2014) (manuscript at 1, 15–20, *passim*) (on file with author).

108. See, e.g., Robertson, *supra* note 43, at 1026 (“We can relinquish the right [to reproduce] totally by sterilization. We may waive it in a particular instance by abstinence, contraception, or abortion.”).

109. See, e.g., R.E. Lawrence et al., *Factors Influencing Physicians’ Advice About Female Sterilization in USA: A National Survey*, 26 HUM. REPROD. 106, 106, 109 (2011) (noting that millions of women have used female sterilization in the U.S., and that physicians often perform the procedure despite their recognition that the patient might experience regret); Susan D. Hillis et al., *Poststerilization Regret: Findings From the United States Collaborative Review of Sterilization*, 93 OBSTETRICS & GYNECOLOGY 889, 890 (1999) (noting the prevalence of sterilization and regret).

110. See Shiffrin, *supra* note 41, at 500, 502 (conceiving of consent to intimate conduct as the transfer of an obligation that an agent “otherwise could make about entry into her personal space”).

111. Cf. *Dubay v. Wells*, 506 F.3d 422, 428–31 (6th Cir. 2007) (affirming the imposition of parental obligations on a man based on his voluntary sexual conduct).

112. See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1379 (2013) (explaining how the value of sexual autonomy intersects with evolving prohibitions on rape).

113. As Professor Radin and others have noted, “[m]eanings [of ‘inalienability’] proliferate because the separation that constitutes alienation can be either voluntary or involuntary, and can result in the entitlement, right, or attribute ending up in the hands of another holder, or in its simply being lost or extinguished.” Radin, *supra* note 104, at 1852. As a result, when people use the

sexual contact, to have a child through one's genetic material, or to terminate one's parental rights—can be given or transferred and in some cases even sold.<sup>114</sup> Moreover, many of these decisions have significant consequences: the decision to have a child creates a long period of legal obligation, accompanied by the additional burden of caring about that child's well-being or having that child's existence attributed to you by others;<sup>115</sup> sterilization, once done, cannot be undone, at least absent significant expense; the decision to surrender a child for adoption may create lasting regret.<sup>116</sup>

The real issue is why these decisions, which we acknowledge can freely be made *now*, cannot be the subject of advance agreement. The underlying choice itself largely remains constant, as do its consequences. The primary reason for discomfort with these agreements, therefore, is their futurity.

Courts generally do not experience this discomfort when dealing with the transfer of property of sentimental value, such as the family home. Nor do they prevent the advance waiver of other constitutional rights. Although virtually all constitutional criminal protections can be waived contemporaneously,<sup>117</sup> some can also be waived by advance agreement. Probationers, for example, can waive their Fourth Amendment right against suspicionless searches in their probation agreements.<sup>118</sup> Agreements that waive a party's due process or Seventh Amendment rights (through settlement, private arbitration, or forum-selection clauses) are routinely enforced, as are agreements restricting free speech, such as confidentiality

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term "inalienable," they could mean that an entitlement, right, or attribute is "nonforfeitable," "noncancelable," "nonwaivable," "nongiveable," "nonsalable," or "completely nontransferable." *Id.* at 1853.

114. Sperm and egg "donors" are typically compensated by fertility clinics for their gametes. See Nancy E. Dowd, *Sperm, Testosterone, Masculinities and Fatherhood*, 13 NEV. L.J. 438, 442 (2013).

115. See I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1135–37 (2008) (describing the psychological harms that might result from public recognition that he or she is a genetic parent even in absence of legal or gestational obligations).

116. See Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 280 (2011) (noting that regret over surrenders rarely affects the validity of consent to adoption); Coleman, *supra* note 58, at 82 n.42.

117. See, e.g., I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1186 (2008) [hereinafter Cohen, *The Constitution and the Rights Not to Procreate*].

118. *United States v. King*, 711 F.3d 986, 988 (9th Cir. 2013) (upholding a search pursuant to a "warrantless search condition, . . . with or without probable cause").

agreements.<sup>119</sup> Although many scholars have expressed discomfort with these waivers,<sup>120</sup> the long-term trend has favored them.<sup>121</sup>

The approval of agreements providing for the advance waiver of other constitutional rights does not necessarily mandate similar treatment for choices of the type protected by substantive due process. But it does mean that one cannot simply rely on the fact that the choices are constitutionally protected in order to categorically exempt them from the realm of contract. To treat them differently requires some sort of justification. One possibility is that people are more likely to change their minds regarding these intimate choices than other types of choices in their lives. Another is that separate policy reasons exist to restrict choices of this nature because of some perceived harm to the person or to society.<sup>122</sup> None of the proponents of the different selves rationale make these arguments or offer support for them. These justifications do not even sound especially plausible from an armchair perspective: are people really more likely to change their views about having children than they are about what type of career to pursue with their law degree or whether to own or rent a home?<sup>123</sup>

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119. See Cohen, *The Constitution and the Rights Not to Procreate*, *supra* note 117, at 1186–91 (providing examples); Rothman, *The Inalienable Right*, *supra* note 104, at 217 (noting that “one can waive one’s speech rights by agreeing to be employed by the government, which brings with it certain restrictions on what one can say”). Rothman also argues that even if the common law right of publicity were constitutionally protected, it should still be the proper subject of a limited contractual waiver. See Rothman, *The Inalienable Right*, *supra* note 104, at 209, 234.

120. See, e.g., Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 269–74 (1998) (providing examples of contracts restricting speech but ultimately arguing that not all advance waivers of speech rights should be allowed).

121. The mechanics of waiver by contract is a subject that deserves more attention than I am able to give it in this Article. By citing examples of other types of constitutional waivers, I do not mean to endorse the validity of those waivers in all instances. I only intend to prove that something more than the constitutional status of a right must justify its inalienability.

122. This last reason is less plausible given that courts have said that the government has no business interfering in these types of decisions.

123. A meta-analysis of regret-ranking studies found that people were more likely to regret decisions about education or careers than decisions about romance or family. Neal J. Roese & Amy Summerville, *What We Regret Most . . . and Why*, 31 PERSONALITY & SOC. PSYCH. BULL. 1273, 1281 (2005). One colorful example involves Angus T. Jones, a star on the popular sitcom “Two and a Half Men,” who recorded a video in which he asked viewers to “please stop watching” his show and said he no longer wished to appear on it. Bill Carter, *Another Star Lashes Out, and “Two and a Half Men” Keeps Cruising*, N.Y. TIMES (Nov. 27, 2012, 3:43 PM), <http://mediadecoder.blogs.nytimes.com/2012/11/27/another-star-lashes-out-and-two-and-a-half-men-keeps-cruising/>, archived at <http://per>

In other words, the justifications for the different selves rationale are that the self has changed and that the self has changed with respect to intimate choices differently than it has changed with respect to other choices that the courts and commentators would not see fit to protect. Unless these underlying assumptions hold, there is either no reason to depart from the generic view of personal identity or no reason not to consider the different selves rationale in other areas of contracting.

*B. Beyond Negative Liberty: The Unbounded Self?*

Conceptions of autonomy can range from thin to thick based on how broadly the right of personal autonomy is characterized and how far the law is willing to go to protect it.<sup>124</sup> The different selves rationale presumes an incredibly thick right, yet undermines it in significant respects.

The Supreme Court has said of the types of choices captured in intimate agreements that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>125</sup> This understanding of autonomy sounds capacious. But even the Court’s arguably more far-reaching decisions, like the recent decision in *United States v. Windsor*,<sup>126</sup> have largely sought only to protect *conditions* in which such choices are made by striking down governmental restrictions.<sup>127</sup>

These decisions are not helpful when it comes to resolving disputes over private agreements, however, because they do not

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ma.cc/U9D4-W2HR. People speculated that Jones’s change of mind was influenced by his religious beliefs. *See id.* Within a week, Jones publicly apologized for his remarks. *Id.*

124. *See* Rubinfeld, *supra* note 112, at 1417 (contending that in the area of sex, courts’ conceptions of autonomy are “very thick”).

125. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

126. 133 S. Ct. 2675, 2694 (2013) (striking down section three of the Defense of Marriage Act because it “demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify”).

127. *See id.*; *see also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.”). The notion that the Constitution only guarantees a form of negative liberty has been challenged by scholars, *see, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990), and is, at any rate, supplemented by laws creating positive obligations on behalf of the state, *see, e.g.*, Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1120 (2002) (noting that the state has an affirmative duty to protect its citizens’ rights of privacy through “property rights, tort law, criminal law, and other legal devices”).

answer the question of whether a person's previous choices constitute an improper restriction of his current freedom. In other words, having removed improper restraints on a person's initial choice, has the state satisfied its constitutional obligations?<sup>128</sup> Or must the state protect the person from his prior choice in order to ensure his privacy or liberty? The different selves rationale answers the latter question affirmatively: to enforce the agreement would amount to the state "forcing" the person to do what he no longer wishes rather than the person himself doing the forcing.<sup>129</sup>

By conferring a right to reconsider one's initial choice, the different selves rationale conveys a much broader freedom of action than the generic view of personal identity. That is because the person's freedom of action is not constrained by the state *or* by that person's prior commitments. The person is given the right to always live in accordance with his "basic sense of self" at the present moment, the self unbounded.<sup>130</sup>

However, by enhancing a person's individual freedom, the different selves rationale diminishes that person's ability to pursue goals that require the cooperation of others. Many choices of an intimate nature are collaborative rather than atomistic: sex, reproduction, and marriage all involve the participation of others. As numerous contracts scholars have noted, one's ability to obtain something of value often depends on securing the cooperation of another; where neither party has a guarantee that the other will

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128. Implicit in these questions is a larger, and unresolved, dispute about whether enforcement of private agreements can violate the Constitution, and in what circumstances. The most comprehensive discussion of this issue within the context of agreements for the use of reproductive technologies can be found in Cohen, *supra* note 115, at 1172–83 (concluding that the enforcement of private agreements likely does not trigger state action). Other scholars have assumed that enforcement would constitute state action without lengthy analysis of the issue. See, e.g., Robertson, *supra* note 43, at 1027 n.167; Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 362 (1990) [hereinafter Shultz, *Reproductive Technology*]. Although I sidestep the state action question now, I intend to address it in future work.

129. On the issue of "forcing," see *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000); Coleman, *supra* note 58, at 96.

130. Coleman, *supra* note 58, at 96. Coleman suggests that "[m]aking the right to control these decisions inalienable ensures that, as a person's identity changes over time, she will not be forced to live with the consequences of prior decisions" like "mourning, guilt, and regret." *Id.* at 96–97. As I discussed above, however, even contemporaneous choices on reproductive matters can have unavoidably significant consequences. And as I will discuss in the next Part, the choices one makes at the time of the legal dispute can bring future regret.

perform, there may be a failure to deal.<sup>131</sup> Even where there is not, when parties do enter into agreements, granting each of them the freedom to reconsider his or her earlier commitments leaves both in a position to infringe the freedom of the other. In *In re Marriage of Witten*, for example, the practical consequence of granting Trip Witten the freedom to object at any time to the use of cryopreserved embryos created with his sperm was that Tamera, his ex-wife, could never use those embryos barring his later change of mind.<sup>132</sup> Although one might argue that Tamera could reproduce through other means, she was a thirty-six-year-old with a history of fertility problems, so her ability to have a biological child was certainly made more difficult without the cryopreserved embryos.<sup>133</sup> In *J.B.*, it was the wife's preference not to use the embryos that interfered with the husband's desire, consonant with his religious beliefs, to create life.<sup>134</sup>

By granting a right to reconsider one's initial choices, the different selves rationale also illustrates the influence of existing default rules that operate to resolve stalemates. Although either party to an embryo disposition agreement could subsequently prefer *to use* the embryos rather than to destroy them, a rule regarding contemporaneous mutual consent for use would always privilege non-use.

Thus, even when courts provide individuals maximum freedom to reconsider their earlier decisions, their choices may be limited by others' choices or default preferences.

### C. Choosing Between Selves

The previous two subparts demonstrate that the different selves rationale raises questions that could significantly impact the way we think about contractual commitments. The rationale raises an additional conceptual question: acknowledging that preferences

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131. Scott & Scott, *supra* note 1, at 1255–56 (suggesting that relationships that do not impose legal consequences for defection discourage investment in those relationships).

132. *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003).

133. Brief of Respondent-Appellant/Cross-Appellee at 8, *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) (No. 03-0551); Reply Brief of Respondent-Appellant/Cross-Appellee at 8, *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) (No. 03-0551).

134. *J.B. v. M.B.*, 783 A.2d 707, 712, 720 (N.J. 2001). Several scholars have found this harm to the other contracting party's reliance interests sufficient to justify a rule protecting them. *See, e.g.*, Robertson, *supra* note 43, at 1001–04, 1029. I agree that reliance is a powerful concern in this context, but do not depend on this independent line of thinking in my analysis of the identity problem.

change, why privilege a person's preferences at the time of a legal dispute?

On first glance, a later preference might seem more valid than an earlier preference, as it can take into account both the earlier preference and subsequent changes. Implicit in this view is the assumption that additional information makes the subsequent preference superior to the previous, less-informed preference.<sup>135</sup> Note, as an initial matter, that honoring the later preference on this basis would depart substantially from the traditional view in contract law that a commitment is binding even without complete information on all possible contingencies: "you must often decide on the basis of such information as you already have or can conveniently acquire, and you are expected, by and large, to bear the consequences of not having enough."<sup>136</sup> But even accepting this reasoning, a person's preferences at the time of the legal dispute should not necessarily control. That is because the possibility of change, and the inevitability that new information will be acquired as one lives her life, invites the possibility of future change. In short, there is still a future prediction problem at the time the court resolves any contract dispute.

People change their minds both before and after lawsuits. Yet courts, hesitant to impose "permanent" consequences based on superseded preferences, may make decisions with permanent consequences based on preferences that are no less transitory. Examples certainly exist of parties who have appeared before the courts with certain desires regarding choices of personal significance and have subsequently changed their minds.

A particularly well-known example is Norma McCorvey, the "Roe" of *Roe v. Wade*.<sup>137</sup> McCorvey agreed to be a plaintiff in a lawsuit challenging the constitutionality of Texas's anti-abortion statutes.<sup>138</sup> In the complaint, she alleged "that she was unmarried and pregnant" and that "she wished to terminate her pregnancy by

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135. Rebecca Dresser relies on this reasoning to question the desirability of medical advance directives. See Rebecca Dresser, *Precommitment: A Misguided Strategy for Securing Death With Dignity*, 81 TEX. L. REV. 1823, 1835 (2003); see also Coleman, *supra* note 58, at 90 (providing a hypothetical scenario regarding the disposition of cryopreserved embryos in which a wife who formerly elected to donate her remaining embryos finds, after having children successfully through the IVF process, that the idea of others raising *her* children would offend her deeply).

136. FARNSWORTH, *supra* note 23, at 22.

137. 410 U.S. 113 (1973) (limiting the ability of states to prohibit abortion).

138. See Joshua Prager, *The Accidental Activist*, VANITY FAIR, Feb. 2013, at 113, available at <http://www.vanityfair.com/culture/2013/02/norma-mccorvey-roe-v-wade-abortion>, archived at <http://perma.cc/W2XD-YTJC>.

an abortion.”<sup>139</sup> Between the filing of the complaint and the Supreme Court’s decision nearly three years later, she gave birth to a child and placed it for adoption, yet she still publicly praised the decision.<sup>140</sup> For a time in the late 1980s and early 1990s, McCorvey continued to advocate in support of abortion rights.<sup>141</sup> In 1995, though, McCorvey changed her views after experiencing a religious conversion, ultimately creating a non-profit organization with the purpose of undoing the effects of her previous involvement in the reproductive rights movement.<sup>142</sup> In 2003, she even filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) seeking to revisit the Supreme Court’s decision in *Roe*.<sup>143</sup>

McCorvey’s shift provides anecdotal support for a commonsense assumption: if people’s preferences are likely to change on certain matters, then they may still change after a legal dispute. Proponents of the different selves rationale ignore this point. The *J.B.* court, for example, held that it would not enforce prior agreements disposing of cryopreserved embryos because “[e]nforcement . . . at some future date in a case where one party has reconsidered his or her earlier acquiescence” could force a party “to become a biological parent against his or her will.”<sup>144</sup> It therefore affirmed a lower court decision to destroy the embryos.<sup>145</sup> What the court failed to recognize is that by having the embryos destroyed, it nominally protected the ability to reconsider but foreclosed the possibility of future changes of mind: neither spouse could thereafter decide to use those embryos to reproduce.

Nothing in the different selves rationale justifies treating a pre-dispute change of mind differently from a post-dispute change. If our preferences about important matters are likely to change throughout our lives so that we cannot be held tomorrow to our choices of today, the point of resolution is just an arbitrary snapshot. Although there may be legal, procedural reasons for differentiating between commitments expressed in a contract and commitments made before the court (judicial estoppel, increased

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139. *Roe*, 410 U.S. at 120.

140. Prager, *supra* note 138, at 113.

141. *See id.* at 114.

142. *Id.* at 115.

143. *See* McCorvey v. Hill, 385 F.3d 846, 847 (5th Cir. 2004) (describing the procedural history of McCorvey’s action).

144. *J.B. v. M.B.*, 783 A.2d 707, 718 (N.J. 2001).

145. *See id.* at 720. The court left open the possibility that the embryos could remain frozen for some additional period of time if J.B. would consent and M.B. would pay the storage fees, but it is unclear whether that in fact occurred. *See id.* Moreover, even a period of prolonged storage could not last forever for practical reasons including the length of time the fertility clinic agreed to store the embryos.



formality, etc.), those differences cannot prevent internal changes of mind, as *McCorvey*'s case indicates. Certainly the solemnity of the marriage ceremony and the signing of the marriage license do not prevent divorce in any measurable way.<sup>146</sup> Nor does the value of "freedom of personal choice in matters of marriage and family life"<sup>147</sup> differentiate between pre-dispute and post-dispute changes of mind.

The different selves rationale calls into question the defining attributes of contract law: its futurity, its ability to hold parties to discarded choices, and its ability to identify preferences to enforce. But it raises more questions than it answers: to what choices should the different selves rationale apply, and why should the law protect the preferences expressed at the time of a legal dispute over the preferences expressed at other times? These deficiencies suggest that the different selves rationale fails on its own terms.

### III. PERSONAL IDENTITY AND CONTRACTUAL COMMITMENTS

As the previous Parts have demonstrated, the different selves rationale challenges the legitimacy of holding people responsible for commitments made by their earlier selves based on changes of preference related to certain highly important decisions. The different selves rationale does not appear to go so far as to suggest that people are physically discontinuous over time—e.g., that differences in their physical bodies cause the later self to be a different person—nor does it question some meaningful level of psychological connectedness—e.g., shared emotions, memories, or preferences.<sup>148</sup> It therefore cannot be squared with the theories that make up the generic view of personal identity.<sup>149</sup> A case could be made, however, that the different selves rationale demands a heightened standard of identity that accounts for the ability to integrate past and present preferences regarding important matters. This concern raises questions that sound in the register of an emerging theory of personal identity: narrative identity. This Part

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146. Nor does the petitioning of the court for the right to get married, as the experience of the named plaintiffs in the landmark Massachusetts marriage equality case, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), indicates. See Michael Levenson, *After 2 Years, Same-Sex Marriage Icons Split Up*, BOSTON GLOBE, July 21, 2006 (discussing the split of Julie and Hillary Goodridge).

147. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 499 (1977)).

148. See *supra* notes 33–35 and accompanying text.

149. See *supra* Part I.A.

evaluates the validity of the different selves rationale in light of that theory.

*A. The Concept of Narrative Identity*

Scholars in various fields have converged on an appreciation of the role that narrative plays in the establishment of personal identity. Recall the questions that theories of personal identity seek to answer: What makes one the person one is? What connects a person over time? These questions raise problems of sameness or reidentification—whether a thing at Time<sub>2</sub> is the same as a thing at Time<sub>1</sub>—and the challenge of characterization—what makes one the person one is.<sup>150</sup> The answers to these questions support the attribution of responsibility or compensation for past actions and justify self-interested concern about the future.<sup>151</sup> Paul Ricoeur has suggested that people have an “intuitive pre-understanding” of the role that narrative plays in answering these questions: “do not human lives become more readable [*lisibles*] when they are interpreted in function of the stories people tell about themselves? And these ‘life stories,’ are they not rendered more intelligible when they are applied to narrative models—plots—borrowed from history and fiction (drama or novels)?”<sup>152</sup>

Proponents in the fields of philosophy and psychology largely agree on the defining aspects of narrative identity.<sup>153</sup> At its core, narrative identity is self-constitutive. A leading proponent in philosophy, Marya Schechtman, has argued that “a person creates

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150. See SCHECHTMAN, *supra* note 32, at 2; Paul Ricoeur, *Narrative Identity*, 35 PHIL. TODAY 73, 74–75 (1991).

151. See SCHECHTMAN, *supra* note 32, at 2 (identifying “survival, moral responsibility, self-interested concern, and compensation” as the “four basic features of personal existence”).

152. Ricoeur, *supra* note 150, at 73.

153. Several legal scholars have noted the popularity of the theory of narrative identity outside the legal academy, although it has made little headway within. See, e.g., Gaia Bernstein, *Accommodating Technological Innovation: Identity, Genetic Testing and the Internet*, 57 VAND. L. REV. 965, 973 & *passim* (2004) (examining how technological innovations affect perceptions of identity); Sean Hannon Williams, *Self-Altering Injury: The Hidden Harms of Hedonic Adaptation*, 96 CORNELL L. REV. 535, 568–72 (2011) (analyzing the intersection between hedonic damages and narrative identity in the tort context). Despite this theory’s popularity, this Article does not suggest that narrative identity definitively solves the identification and characterization questions. See *supra* Part II.A.1. DeGrazia, for example, argues that the concept of narrative identity cannot explain why a person may continue to exist even in the absence of a narrative identity (e.g., in a vegetative state) or why narrative identity cannot continue to exist when the human animal no longer does (e.g., death). See DEGRAZIA, *supra* note 33, at 79–80, 114.

his identity by forming an autobiographical narrative—a story of his life.”<sup>154</sup> “[I]ndividuals constitute themselves as persons by coming to think of themselves as persisting subjects who have had experience in the past and will continue to have experience in the future, taking certain experiences as theirs.”<sup>155</sup> The inclusion of traits, actions, and experiences into the self-narrative become the person’s “by virtue of that inclusion.”<sup>156</sup> This self-constitutive approach to identity explains why a person can take responsibility for past acts or steps in her future self-interest: a person’s identity is hers “because she acknowledges her personhood and appropriates certain actions and experiences as her own.”<sup>157</sup>

The narrative form helps a person “make sense of meanings that unfold in and through time.”<sup>158</sup> A person is likely to experience a “wide range of different, and likely conflicting, roles that characterize a given life in the here and now,” as well as contrasts that occur over time.<sup>159</sup> One’s personal identity must integrate both types of contrasts, a process that is not always neat or easy.<sup>160</sup>

The narrative form plays an important role in providing coherence. According to Schechtman, “[p]erhaps the most salient feature of the narrative form in general is that the individual incidents and episodes in the narrative take their meaning from the broader context of the story in which they occur.”<sup>161</sup> Under this

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154. SCHECHTMAN, *supra* note 32, at 93.

155. *Id.* at 94.

156. *Id.*

157. *Id.* at 95. *See also* Ricoeur, *supra* note 150, at 77 (“The act of telling or narrating appears to be the key to the type of connectedness that we evoke when we speak . . . of the ‘interconnectedness of life.’”).

158. Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 14, 14 (Peter Brooks & Paul Gewirtz eds., 1996).

159. HENRY RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* 152 (1994) (noting the independence of the coherence of one’s views at any given time and the “constancy of one’s commitments through time”); McAdams, *supra* note 30, at 99–100. McAdams presents the following example of synchronic contrasts: “‘When I am with my father, I feel sullen and depressed; but when I talk with my friends, I feel a great surge of optimism and love for humankind.’” McAdams, *supra* note 30, at 99. He provides the following examples of diachronic contrasts: “‘I used to love to play baseball, but now I want to be a cognitive psychologist.’ Or, ‘I was a born-again Christian, but these days I feel I am an agnostic.’” *Id.* at 99–100.

160. *See* SCHECHTMAN, *supra* note 32, at 97–98 (noting a spectrum of intelligibility ranging from “perfect intelligibility—a life story in which every aspect coheres with every other” to “a random sequence of experiences that have little, if any, relation to one another”).

161. *Id.* at 96.

view, no particular time-slice of a life is fully intelligible on its own. Schechtman suggests that narrative identity depends on the existence of a “plot” or “story” that allows a person to have a self-conception as a “well-defined character.”<sup>162</sup> Psychologists have noted that the reliance on stories is part of the developmental process during which a child becomes an adult. It is at adolescence when a person realizes that “one’s life, as complex and dynamic as it increasingly appears to be, might be integrated into a meaningful and purposeful whole.”<sup>163</sup> Because “[i]n virtually all intelligible stories, humans or humanlike characters act to accomplish intentions, generating a sequence of actions and reactions extended as a plot in time,” these stories are particularly useful to adolescents struggling to arrange “potentially discordant and unrelated aspects of selfhood into a purposeful psychosocial configuration.”<sup>164</sup>

The reliance on plot, which inherently depends to an extent on inherited or provided stories, raises additional concerns. The existence of narrative identity, however, and the value of the purposes it serves, are difficult to refute.

People generally seek self-continuity. A coherent sense of self is thought to be healthy from a psychological point of view. It is related to higher levels of self-esteem, positive affect, and authenticity, and to lower levels of depression or negative affect.<sup>165</sup> The absence of self-continuity is “the hallmark of some forms of psychopathology, particularly some personality disorders,” and is linked to an increased risk of suicide.<sup>166</sup> Considering the extreme case of an individual without any narrative self-conception “whose sentience is focused always on the present and never extends . . . to the past or future,” Schechtman concludes that such a life would be so

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162. *Id.* at 96–97.

163. McAdams, *supra* note 30, at 101. Some cognitive functions that pertain to identity formation, such as autobiographical memory, no doubt begin to develop far before adolescence. *See, e.g.*, Mark L. Howe, *Early Memory, Early Self, and the Emergence of Autobiographical Memory*, in *THE SELF AND MEMORY* 45, 45 (Denise R. Beike, James M. Lampinen, & Douglas A. Behrend eds., 2004).

164. McAdams, *supra* note 30, at 101.

165. Susan Bluck & Nicole Alea, *Remembering Being Me: The Self Continuity Function of Autobiographical Memory in Younger and Older Adults*, in *SELF CONTINUITY: INDIVIDUAL AND COLLECTIVE PERSPECTIVES* 55, 65 (Fabio Sani ed., 2008).

166. Kate C. McLean, *Stories of the Young and the Old: Personal Continuity and Narrative Identity*, 44 *DEVELOPMENTAL PSYCHOL.* 254, 254 (2008). *See also* Fabio Sani, *Introduction and Overview*, in *SELF CONTINUITY: INDIVIDUAL AND COLLECTIVE PERSPECTIVES* 1, 3 (Fabio Sani ed., 2008) (“A lack, or a seriously weakened sense, of self continuity is considered one of the most typical disorders of the self.”).

different from the “kind of life led by the rest of us” as to render the individual a non-person.<sup>167</sup> The foregoing sources suggest a consensus that self-continuity is generally desirable regardless of whether one takes so strong a view about what makes one a person.<sup>168</sup>

Self-continuity is also a prerequisite for self-regarding behavior. As David DeGrazia has observed, “[f]rom the standpoint of the present, we would like to be able to *anticipate* having experiences and performing actions, not just accept the promise that we will, in fact, experience and act. Put another way, we want to be able to *identify* with the future subject-agent, regarding her subjectivity as a continuation of our own.”<sup>169</sup> Various aspects of the narrative process facilitate this orientation to future goals. Psychologists have noted the role of autobiographical memory in locating and defining the self within an ongoing life story that has future implications.<sup>170</sup> The narrative process allows a person to consider the relationship of past events to valued ends, to place them in temporal or sequential order, and to give those relevant events meaning based on the status of the goal (triumph, failure, etc.).<sup>171</sup> Coherence and constancy also

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167. SCHECHTMAN, *supra* note 32, at 101.

168. This is not to say that there is unanimous acceptance of narrative identity. For example, while admitting its widespread acceptance, philosopher Galen Strawson has argued that the notion that people experience their lives as a narrative is both descriptively false and harmful to those who do not experience their lives narratively. See Galen Strawson, *Against Narrativity*, XVII RATIO 428, 428–29 (2004). My argument, however, does not depend on complete unanimity of opinion as to the merits of narrative identity, nor does it depend on refuting Strawson’s critique. Even if, as Strawson suggests, some people experience the world “episodically” as opposed to “diachronically,” *see id.* at 430, I do not understand him to be making the claim that such individuals are prevalent. Moreover, as I argue in Part III.B.1, *infra*, psychological differences may actually justify different legal treatment. It is simply not the case, though, that proponents of the different selves rationale have attempted to justify application of the rationale based on these types of psychological differences.

169. DEGRAZIA, *supra* note 33, at 80.

170. See Donna Rose Addis & Lynette J. Tippett, *The Contributions of Autobiographical Memory to the Content and Continuity of Identity*, in SELF CONTINUITY: INDIVIDUAL AND COLLECTIVE PERSPECTIVES 71, 72 (Fabio Sani ed., 2008); Bluck & Alea, *supra* note 165, at 55; McAdams, *supra* note 30, at 103.

171. See Jefferson A. Singer & Pavel Blagov, *The Integrative Function of Narrative Processing: Autobiographical Memory, Self-Defining Memories, and the Life Story of Identity*, in THE SELF AND MEMORY 117, 125 (Denise R. Beike, James M. Lampinen, & Douglas A. Behrend eds., 2004); *see also* RICHARDSON, *supra* note 159, at 151 (noting that “looking back upon our entire lives is a good way to crystallize out of those self-understandings the hopes and aims we have for the long run”).

enable a person to coordinate with others to achieve shared goals and to carry out activities that extend over a long period of time.<sup>172</sup>

Anticipation of the future affects a person's present experience in at least two senses. First, expectations of future pleasure or pain actually bring about related emotional experiences in the present.<sup>173</sup> Thinking about a future painful experience (such as rejection from graduate school) brings about current discomfort. Additionally, because a person's *actual* future will bring about certain expected experiences, a person will be motivated to take certain responsible actions (like studying for a test).<sup>174</sup> By connecting the present self with the expected future, narrative actually shapes the present by engendering concern with the narrative as a whole.<sup>175</sup> The belief that the life is a narrative whole therefore grounds concepts of moral agency by facilitating future-regarding action and allowing a person to situate it within his own self-narrative. And it grounds concepts of moral responsibility by placing both the person who committed an action and the person experiencing its consequences within the same narrative.<sup>176</sup>

In sum, the concept of narrative identity is useful because it accords with how most people understand personal identity as a descriptive matter and explains how the self mediates between past experiences and future goals. By providing an account of how the selves connect—through a person's own agency—narrative identity also justifies the imposition of punishments and rewards as well as paternalistic interventions, both by the self and by the state (such as saving for retirement or discouraging smoking).

### *B. How Narrative Identity Theory Undermines the Different Selves Rationale*

Narrative identity theory addresses the primary concerns raised by the different selves rationale and offers support for the enforcement of agreements.

The argument here proceeds in three parts. First, I demonstrate that concerns about the identities or the “selves” of a party to a contractual dispute do not justify non-enforcement of agreements. Second, I argue that the future-regarding and self-constituting aspects of narrative identity suggest that people should generally

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172. RICHARDSON, *supra* note 159, at 152 (calling coordination the “crucial pragmatic benefit of coherence”).

173. See SCHECHTMAN, *supra* note 32, at 155.

174. See *id.*

175. See *id.* at 157.

176. See *id.* at 158.

be held to the consequences of their choices. Third, I comment on the limits of the narrative identity theory in the contract context.

*1. Concerns About Differences Between the Selves Should Not Normally Relieve Parties of Their Contractual Commitments*

At this point, it is useful to restate the leading arguments against the enforcement of prior commitments based on concerns about personal identity. Kronman speculated that a promisor's goals might sometimes change so substantially that his previous decisions would now seem irrational and foreign to him.<sup>177</sup> The inability to understand his previous choice would render it "demoralizing" and cause him to lose "confidence in his ability to make lasting commitments."<sup>178</sup> Building on Kronman's theory, Coleman suggested that decisions regarding the use of assisted reproductive technologies could seem like those of a "completely different person" at the time of a subsequent contract dispute due to intervening life changes.<sup>179</sup> He argued that choices related to reproduction or familial relationships would be subject to change, such that they should remain inalienable.<sup>180</sup> Courts have sometimes adopted these views, deciding that a person should not be able to bind his future self on matters of personal importance.<sup>181</sup> The narrative identity theory addresses the assumptions inherent in these arguments.

*a. Against the Discontinuity Assumption*

First, the narrative identity theory suggests that assumptions about discontinuity are descriptively false, at least in the presumably healthy individuals that normally enter into agreements. The maintenance of a sense of personal continuity "is crucial to psychological adaptation throughout the life course" so much so that its absence is "the hallmark of some forms of psychopathology."<sup>182</sup> Most people appear to strive toward self-continuity and integrate even significant goal changes within their narrative identities, e.g., "I was a born-again Christian, but these days I feel I am an agnostic."<sup>183</sup> Of course, new experiences can

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177. See Kronman, *supra* note 46, at 780–82.

178. *Id.* at 782.

179. See Coleman, *supra* note 58, at 91.

180. See *id.* at 92–95.

181. See, e.g., *J.B. v. M.B.*, 783 A.2d 707, 718 (N.J. 2001) (refusing to make someone a genetic parent "against his or her will").

182. McLean, *supra* note 166, at 254.

183. McAdams, *supra* note 30, at 100.

cause a person to revise her self-narrative, but that experience is usually processed through the narrative instead of externally to it.<sup>184</sup> This characteristic suggests that people are likely to view even painful experiences as their own.

It is true that some individuals lack the ability to form a coherent self-narrative because of incapacity or illness. Infants, for example, lack the cognitive abilities necessary to conceive of themselves as distinct individuals persisting through time.<sup>185</sup> People suffering from severe dementia or Alzheimer's disease might also lose their access to a narrative identity because their consciousness "cannot be pulled together in a coherent whole."<sup>186</sup> Serious dissociative disorders such as dissociative identity disorder (previously described as multiple personality disorder), in which an individual has at least two distinct and relatively-enduring identities or personality states, may also prevent an individual from crafting a coherent self-narrative.<sup>187</sup> Even less pathological dissociative symptoms associated with posttraumatic stress disorder or childhood abuse may interfere with a person's self-narrative to some extent.<sup>188</sup> These conditions could very well prevent people from remembering, understanding, or identifying with a past choice.

A few researchers have studied the possibility that even people who do not suffer from pathological dissociation might nonetheless experience a certain "sense of discontinuity of the self across time."<sup>189</sup> These studies, however, reveal that even though some individuals feel less of a connection to the past, they still remember

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184. See, e.g., McLean, *supra* note 166, at 254.

185. SCHECHTMAN, *supra* note 32, at 146. See also Howe, *supra* note 163 (providing an overview of the development of autobiographical memory and its relation to language skills from a developmental psychological perspective). In an interesting discussion of access to assisted reproductive technologies by adolescents, Michele Goodwin and Naomi Duke have made a compelling argument that courts should focus on the capacities of the particular teens seeking treatment. Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 HARV. J.L. & GENDER 503, 551–52 (2011). The ability of a child or adolescent to craft a coherent self-narrative is closely related to the capacities test that Goodwin and Duke develop. See *id.*

186. SCHECHTMAN, *supra* note 32, at 147.

187. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-5 (2013).

188. On the use of the Dissociative Experiences Scale to measure dissociative symptoms, see Eve Bernstein Carlson & Frank W. Putnam, *An Update on the Dissociative Experiences Scale*, 6 DISSOCIATION 16, 16 (1993).

189. James M. Lampinen, Timothy N. Odegard, & Juliana K. Ledding, *Diachronic Disunity*, in THE SELF AND MEMORY 227, 231 (Denise R. Beike, James M. Lampinen, & Douglas A. Behrend eds., 2004).



it.<sup>190</sup> And they still appear to understand that past within the framework of a continuous story. As an example of someone experiencing “diachronic disunity,” the authors of one study provide the following statement from a subject:

I feel that I am not the same person I was five years ago, because I have changed spiritually. I am now a Christian, and I look at life completely differently from the way I did five years ago before I was saved. Because of my faith in Christ I no longer worry like I used to. I do not get stressed out as much. I do not get offended like I used to either.<sup>191</sup>

This statement adopts a narrative perspective that draws on experiences in the past to make sense of the present. The speaker does not only refer to his or her current state (a Christian) but recognizes “change[.]” and “differen[ce].” The speaker perceives the experience of being “saved” as having brought about developments in his or her personality that the speaker perceives to be beneficial. It seems clear, therefore, that regardless of the fact that the speaker self-identifies as a different person, he or she exhibits the characteristics of continuity that support the existence of a unified narrative identity.

Underlying the different selves rationale is a misplaced assumption about the impact of improvident decisions. Adherents to that position worry about the harm to a current self brought about by a prior bad decision. What the literature on narrative identity suggests, though, is that in addition to providing unity, the narrative process is adaptive. That is, it prevents previous decisions from sticking out like a foreign element in a person’s life. Although some psychologists have recognized that certain experiences may best be characterized as a foreign element, for example, as a result of trauma<sup>192</sup> or because society suppresses dialogue regarding those experiences,<sup>193</sup> they are the rare exception and can—and perhaps should—be recognized as such. Suffice it to say that most contract disputes do not involve choices of that sort. Support for the concept of a narrative identity therefore strikes at

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190. *Id.* at 249.

191. *Id.* at 237.

192. See, e.g., Sarah L. Halligan et al., *Posttraumatic Stress Disorder Following Assault: The Role of Cognitive Processing, Trauma Memory, and Appraisals*, 71 J. CONSULTING & CLINICAL PSYCHOL. 419, 419 (2003) (discussing the effects of a traumatic experience on the self-narrative).

193. See Robyn Fivush, *The Silenced Self: Constructing Self from Memories Spoken and Unspoken*, in THE SELF AND MEMORY 75, 75 (Denise R. Beike, James M. Lampinen, & Douglas A. Behrend eds., 2004) (discussing the silencing of sexual abuse and its effect on the self-narrative).

the core of the different selves rationale, namely the suggestion that there are substantially different selves at play in contracting situations.

*b. Against the Assumption of Limits on Future-Regarding Choice*

Second, the narrative identity theory suggests that people can make future-regarding choices in the service of their goals on a range of matters and that it is possible to deliberate about how those choices will affect their future selves. An implication of Coleman's position that any number of intervening events will render reproductive decisions obsolete is that a person cannot adequately look out for her future self in that regard. But, as proponents of a narrative identity theory make clear, self-continuity satisfies the present desire for our lives "to *continue* to unfold and include . . . future actions and experiences."<sup>194</sup> Nothing in the literature suggests that conscious choices about intimate matters that people memorialize in agreements are less bound up in expectations about the future or result from different decision-making processes.

*c. Against Privileging the Time<sub>2</sub> Self*

Moreover, the concept of narrative identity reveals the extent to which courts adopting the different selves rationale privilege the later self without any legitimate basis for doing so. When courts and commentators refer to changed or later selves, or problems with self-binding, they do not remain neutral but side with the self that appears before the court in the actual dispute.<sup>195</sup> What the narrative framework makes clear, though, is the extent to which this decision rests on illusions of narrative authority. Recall that the different selves rationale could not justify why a court should impose final consequences based on preferences that had already changed but might logically change again at some later time.<sup>196</sup> The literature on narrative identity explains why this is the case. A person constructs a narrative identity to make sense of the experiences and events in one's life. The self-narrative may be

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194. DEGRAZIA, *supra* note 33, at 81 (emphasis added).

195. *See supra* Part II.C.

196. *Id.*

relatively stable, but even the goals around which the narrative is oriented can change.<sup>197</sup>

Because the end goals can change over time, there is no objective standard by which to assess the validity of any given action or preference. When a person creates her self-narrative, she does so only from a position of limited authority because she does not know how her story will ultimately unfold. Interestingly, multiple researchers have observed differences between older and younger adults that reflect this reality.<sup>198</sup> Although change is still possible, older adults, with less of their lives to look forward to and more important decisions in the rearview mirror, “have a well-defined sense of self that shows remarkable stability and resiliency.”<sup>199</sup> Younger adults, in contrast, experience more uncertainty regarding the extent to which they have changed and spend more time reinterpreting old events in light of newer experiences.<sup>200</sup> One can infer that closer proximity to the end of the life story provides more interpretive certainty regarding its component parts.

This subjectivity has not been lost on literary critics who study the narrative form. It is only in light of known ends that we can make final judgments about the significance of particular occurrences. Peter Brooks has observed that:

[N]arratives work back from their ends, which are the real determinants of their vectors, the direction and intention of their plotting. . . . [A] large part of [a narrative’s] coherence derives from the knowledge that an end lies in wait, to complete and elucidate whatever is put in motion at the start.<sup>201</sup>

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197. Denise R. Beike, Erica Kleinknecht, & Erin T. Wirth-Beaumont, *How Emotional and Nonemotional Memories Define the Self*, in *THE SELF AND MEMORY* 141, 147 (Denise R. Beike, James M. Lampinen, & Douglas A. Behrend eds., 2004). Henry Richardson has suggested that even the content of ultimate ends, such as happiness, are subject to deliberation and revision. See RICHARDSON, *supra* note 159, at 226.

198. Bluck & Alea, *supra* note 165, at 58.

199. *Id.* (comparing the responses of individuals around the age of 70 to individuals around the age of 20).

200. *Id.* at 66. See also McLean, *supra* note 166, at 255 (noting that younger people “narrate the self in terms of change” due to the instability of their identity and life experiences, the greater sense of possibilities in the future, and the greater potential to integrate new material into their life stories).

201. BROOKS, *supra* note 36, at 125. See also Peter Brooks, *Repetition, Repression, and Return: Great Expectations and the Study of Plot*, 11 *NEW LITERARY HIST.* 503, 504 (1980) (arguing that characteristics of a plot “already suggest the predominant importance of the end as that moment which

In other words, we can only be sure whether actions were on the whole “good” or “bad,” or reflective of the person’s “true” interests at the end. “[H]ow can we condemn something that is ephemeral, in transit?,” Milan Kundera has asked.<sup>202</sup> “In the sunset of dissolution, everything is illuminated by the aura of nostalgia, even the guillotine.”<sup>203</sup>

The lack of authority may not be apparent to a particular person at a particular time because of the person’s ability to modify her self-narrative to suit her developing needs. Philosophers and psychologists alike believe that people can and do craft their narratives in the absence of perfect finality.<sup>204</sup> The legal system, however, struggles with this lack of authority because it seeks to resolve disputes at a particular moment. It struggles to impose “truth” upon a moving target whose movements might render a judicial decision obsolete.

Preoccupied as it is with the concept of final ends, the law has imposed finality where it might not otherwise exist. As an example, Brooks points to the “inevitable discovery” exception to the exclusionary rule articulated in *Nix v. Williams*.<sup>205</sup> In that case, the criminal defendant guided law enforcement to the body of his victim after a detective gave a “Christian burial speech” in violation of the defendant’s Sixth Amendment right to counsel.<sup>206</sup> The Court reasoned that the body was within the area that would have been searched, had the search not been called off because of the defendant’s actions, and would therefore have been found independently.<sup>207</sup> But as Brooks points out, the Court’s doctrine of inevitable discovery “clearly starts from the end of the trail of the search—at the dead body—and then traces the path, be it inevitable or merely probable, that would have led to it.”<sup>208</sup> We see

illuminates, and casts retrospective meaning on the middle, and indeed defines the beginning as a certain desire tending toward the end”).

202. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* 4 (Trans. Michael Henry Heim, Harper & Row 1984).

203. *Id.* As Walter Benjamin has argued, it is the knowledge and finality of death that we are denied in our own lives and that we seek in the narratives we consume. Walter Benjamin, *The Storyteller: Reflections on the Works of Nikolai Leskov*, in *ILLUMINATIONS* 101 (Hannah Arendt ed., Harry Zohn trans. 2007) (1968).

204. *See supra* note 197.

205. 467 U.S. 431 (1984).

206. *Id.* at 441 (describing how the officer emphasized to the defendant, who was being driven from one part of Iowa to another, how much he desired finding the body of the victim before snowy weather set in so that the victim’s parents could give her a “Christian burial”).

207. *See id.* at 449–50.

208. BROOKS, *supra* note 36, at 124.

the Court crafting its narrative in light of a known end begotten through admittedly illegitimate means. The case method introduced at Harvard Law School by C.C. Langdell provides another example of “retrospective prophecy” in the law.<sup>209</sup> Standing at the point of the outcome, the decision in a particular case, “[t]he point of the exercise, in a pedagogical and cognitive sense, is to retrace how that outcome was inevitable from the ‘facts of the case.’”<sup>210</sup> Satisfaction comes from understanding, based on the known ending, that “it had to be this way and no other way.”<sup>211</sup>

In short, courts and commentators have resisted this indeterminacy by treating current preferences as fixed and resolving the dispute in light of those preferences. They assume an end, ultimately true or not, and work back from there.

Not only does this retrospective approach shift attention away from the context of the dispute in an ongoing narrative, but it also begins from the starting point of the party’s changed preference rather than asking, in the first instance, whether the choice was problematic at the time it was made. Courts adopting the different selves rationale, for example, have framed the inquiry in terms of whether it would be permissible to enforce an agreement over a party’s later objection.<sup>212</sup> They explicitly look backwards from the party’s current preference. Typically, courts considering most contract disputes focus on the parties’ circumstances and understandings during the contract formation process.<sup>213</sup> The different selves rationale skips the question whether the choice was properly made, substituting categorical limitations on the party’s power to agree. In *Witten*, for example, the court, relying on Coleman’s argument that it may “be impossible” to make advance “decisions about intensely emotional matters, where people act more on the basis of feeling and instinct than rational deliberation,”<sup>214</sup> adopted a rule against enforcing decisions involving marriage and family relationships.<sup>215</sup> From the court’s perspective as

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209. *See id.* at 134.

210. *Id.*

211. *Id.*

212. *See, e.g., In re Marriage of Witten*, 672 N.W.2d 768, 780 (Iowa 2003) (“[A]re prior agreements regarding the future disposition of embryos enforceable when one of the donors is no longer comfortable with his or her prior decision?”); *J.B. v. M.B.*, 783 A.2d 707, 718 (N.J. 2001) (asking whether “[e]nforcement of a contract that would allow the implantation of preembryos at some future date in a case where one party has reconsidered his or her earlier acquiescence” would be permissible).

213. *See supra* notes 13–15 and accompanying text.

214. *Witten*, 672 N.W.2d at 777 (internal citation and quotation marks omitted).

215. *See id.* at 781. Nancy Kim has criticized this decision on different grounds, arguing that the court improperly failed to consider gender-related

the arbiter of a present dispute, this conclusion may sound reasonable. But it bypasses an inquiry into the actual circumstances of the contracting process, instead assuming that the agreement resulted from these deficiencies. This type of reasoning diminishes individual choice on matters of personal importance by foreclosing the possibility of responsible and rational decision-making without even looking at the circumstances in which the agreement was made.<sup>216</sup>

*d. Summary*

At bottom, narrative identity theory demonstrates the weaknesses of the assumptions underlying the different selves rationale. It posits that personal identity is more continuous than it is discontinuous, that it adapts to and incorporates difficult experiences instead of alienating them, and that it continually develops rather than remaining fixed in time. It further explains why judicial interventions based on later, but not final, preferences are unjustified.

*2. The Future-Oriented Aspect of Narrative Identity Weighs in Favor of Enforcing Agreements*

One might argue that even if the theory of narrative identity shows that the different selves rationale is wrong, it offers only a weak argument, if anything, in support of contract enforcement. In this section, I take on that argument and show that the future-regarding

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factors that should have recognized and protected the wife's detrimental reliance. Nancy S. Kim, *Reasonable Expectations in Sociocultural Context*, 45 WAKE FOREST L. REV. 641, 660–68 (2010). Although her prescribed solution—recognizing a claim for promissory estoppel—differs from my own, she also calls attention to the court's misplaced emphasis on the self at the time of adjudication rather than the selves at the time of contracting. *See id.* at 660–68.

216. The retrospective framework used by the *Witten* court echoes the Supreme Court's reasoning in its decision upholding the Federal ban on partial-birth abortions, *Gonzales v. Carhart*, 550 U.S. 124 (2007). There, the Court did not focus on whether a woman could prospectively make an informed decision to use one of the banned abortion procedures. Rather, it assumed that some women would make uninformed decisions without the law. Upon learning more about the banned procedures, those women would “struggle with grief more anguished and sorrow more profound when she learn[ed], only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child . . . .” *Id.* at 159–60. Reasoning backwards from this hypothetical situation, the Court inferred that the regulation might “encourage some women to carry the infant to full term” or might encourage the medical profession to “find different and less shocking methods to abort the fetus in the second trimester.” *Id.* at 160.

aspect of personal identity is a valuable concept threatened by the different selves rationale and vindicated by narrative identity.

People value their connection to their future selves. Continuity allows people to “pursue longer-term projects that [they] value and to become the sorts of people [they] want to be.”<sup>217</sup> As discussed above, people not only derive pleasure (and pain) from considering themselves in a future state, but they also benefit from their connection to their future selves by taking self-regarding actions that they believe will improve their position.<sup>218</sup> These benefits inure to both people and the society in which they live. These values are well established and seemingly beyond debate—few would argue for a policy that explicitly prevents people from taking actions in their future self-interest. Indeed, many public policies, like individual retirement accounts and nutritional labeling, aim to *increase* future-regarding action.

The connection of a person to her future self justifies the apportionment of reward and punishment. This feature benefits society by justifying socially beneficial institutions: much of the law, for instance, is concerned with imposing consequences for past actions.<sup>219</sup> But punishment does not only depend on a connection between the present and the past but also between the present and future. As Steven Knapp has explained, punishment requires a strong identity-relation between the person and the act for which she is being punished:<sup>220</sup>

The question . . . is whether it makes sense to treat a person existing in the present as still the appropriate object of attitudes appropriate to an action she performed in the past. Taken seriously, this can only mean thinking of her as still performing the act in question. For unless she is thought of as still performing the act, . . . she no longer has any control over the act's occurring or not occurring; *she* has no more power over it than anyone else.<sup>221</sup>

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217. DEGRAZIA, *supra* note 33, at 82.

218. *See supra* notes 169–72 and accompanying text.

219. Posner provides the examples of contract and criminal law, but this argument applies as well to most of the law governing the legal relations between persons. *See* Posner, *supra* note 43, at 34.

220. There are a few exceptions to this general rule, such as when the law holds a person vicariously liable for the acts of another. I thank Dick Craswell for bringing this point to my attention.

221. Steven Knapp, *Collective Memory and the Actual Past*, 26 REPRESENTATIONS 123, 136 (1989).

A person cannot literally continue to perform an act that has already occurred. Identification with one's action, therefore, supplies the identity-relation:

We punish [people] in order to make them identify with the act in a way that will constitute their taking responsibility for it. . . . [B]eing responsible in this sense precisely means having a disposition to identify with one's own actual past, to think of oneself as inseparably bound to it, even as if one were presently performing one's past acts and therefore appropriately liable, in the present, to the experience of aversion that should have accompanied the bad ones or the experience of pleasure that should have accompanied the good ones. . . . We want to cause people . . . to anticipate that they will be unable to deny their identity with the selves they are when they commit whatever crime they contemplate committing.<sup>222</sup>

As Knapp explains, self-regarding action depends on a person's ability to take seriously the effect her actions will have on her future self. This indirect form of behavioral control suffers from the fact that both the past and the future are particularly weak constituencies in the present. Narrative identity helps to improve this process by bridging the past and future. The justification of punishment and reward in turn benefits the individual by making her world seem less irrational: "Whereas it seems right to reward virtuous action with something that is pleasant to the virtuous subject, it also seems right to detract from the ill-gotten pleasures of the vicious subject."<sup>223</sup>

Moreover, as Jeremy Waldron has pointed out, the legal system depends to a large degree on the ability and willingness of people to "apply[] officially promulgated norms to their own conduct, rather than waiting for coercive intervention from the state."<sup>224</sup> For this feature to work, people must be viewed as having the ability to act on behalf of their future selves.

To the extent that narrative identity theory facilitates the foregoing societal benefits, departure from that paradigm should not occur thoughtlessly. Still, it is a bit more difficult to value the *individual* harms caused by the different selves rationale. The harm to the party who relied on the agreement or performed to her

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222. *Id.* (original emphasis omitted).

223. SCHECHTMAN, *supra* note 32, at 158.

224. Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 207 (2012) (citing the work of Lon Fuller and Hart and Sacks in support of this proposition).



detriment is clear enough: her expectations regarding matters of importance would be defeated and she might have suffered inconvenience or cost in the process. The harm to the other party would be more difficult to quantify. One could argue, for instance, that a judicial proclamation that a person could not make a particular decision in his best interest on a matter of great personal importance<sup>225</sup> might be demoralizing. Such a decision would also deny the person's agency with respect to that choice.<sup>226</sup> Finally, it might interfere with the person's motivation or ability to integrate that experience into his coherent self-narrative.<sup>227</sup> Those arguments should be met with skepticism, however. It seems that narrative identity is a resilient concept capable of justifying a person's self-interested requests of the court. And it is doubtful that any of the parties advocating a different selves rationale feel a loss of self-respect as a result of the litigation position that they adopted.<sup>228</sup>

Nonetheless, the different selves rationale causes harm to individuals invoking it by restricting their freedom based on an impoverished conception of personal identity. The defining aspect of narrative identity as laid out in the numerous sources cited in this Article is that of self-constitution: people control their identities by including traits, actions, and experiences into their self-narrative and giving them meaning through the narrative process.<sup>229</sup> This view of personal identity accords with the notion of dignity as a status-concept recognizing a person's "ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her," and assuming her capability "to give an account of herself . . . that others are to pay attention to."<sup>230</sup> The dual aspects of authority over oneself and recognition of that authority by the state informed Justice Kennedy's pervasive use of the term "dignity" in the Supreme Court's recent decision invalidating a portion of the

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225. See, e.g., *In re Baby M*, 537 A.2d 1227, 1248 (N.J. 1988) (stating that a surrogate mother "never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed").

226. See SCHECHTMAN, *supra* note 32, at 159 (noting that the "inclusion of a particular action in a person's self-narrative situates it in his life in such a way that he has agency with respect to it").

227. See *id.*

228. Because I assume the lack of support for the notion that a person will suffer harm as a result of the different selves rationale, any future empirical work will most likely strengthen as opposed to undermine my argument in this section.

229. See *supra* notes 154–157 and accompanying text.

230. Waldron, *supra* note 224, at 3.

Defense of Marriage Act.<sup>231</sup> Discussing the marital relation, Justice Kennedy observed that “[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person.”<sup>232</sup> To Justice Kennedy, the “recognition” by some states of same-sex unions as marriages “conferred upon them a dignity and status of immense import.”<sup>233</sup> By imposing “restrictions and disabilities” on that state-provided status, the federal government subjected married same-sex couples to “indignity”—depriving those couples of the recognition—and rights and responsibilities—that the states sought to provide.<sup>234</sup>

The different selves rationale embodies skepticism about a person’s ability to make binding commitments and, as a result, affords people less dignity than that to which they are entitled. Variants of the different selves rationale have been used to invalidate agreements pertaining to surrogacy,<sup>235</sup> embryo disposition,<sup>236</sup> and childrearing<sup>237</sup> on the ground that it would be improper to compel a person to perform certain acts *against his will*, i.e., to a promise made by another version of himself with no authority to bind him. It does not take much imagination to see how the same rationale would apply to numerous other arrangements. Sperm donor agreements provide one example. Many of these agreements require donors and recipients to make long-term commitments to fertility clinics concerning the same types of “intimate” subject matter involved in the cases cited above. Donors, for example, may agree to provide sperm on the condition that their identity will be kept strictly confidential; other donors may agree to be contacted by their genetically related children at some later time.<sup>238</sup> At stake in these agreements are the fathers’ and children’s rights to know or not know genetically related family members and potentially to establish or refuse to

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231. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

232. *Id.* at 2694.

233. *Id.* at 2692.

234. *Id.* For a detailed discussion of Justice Kennedy’s use of “dignity” in previous opinions, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1703–04 & *passim* (2008).

235. *See, e.g., In re Baby M*, 537 A.2d 1227 (N.J. 1988).

236. *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

237. *See, e.g., Zummo v. Zummo*, 574 A.2d 1130, 1141, 1146–47 (Pa. Super. Ct. 1990).

238. The problem that arises in a long-term arrangement like this by virtue of the sheer number of years between promise and performance is separate from, and potentially additional to, the internal change of mind that the different selves rationale identifies.

establish a family connection with them.<sup>239</sup> In such a situation, a person could attempt to have his contemporaneous preference honored so as to defeat the expectations of the other party.

The irony, of course, is that by treating people's choices as subject to change and refusing to impose consequences for them, the proponents of a different selves rationale undermine the dignity of the committing parties in the very realm of the law in which dignity is arguably most essential. Moreover, as demonstrated above, the reasons to confine the view to intimate agreements are very thin.<sup>240</sup>

A more fully considered understanding of personal identity therefore suggests that holding people to their commitments actually benefits rather than harms them. Personal identity offers a reason to enforce agreements rather than a reason not to.

### 3. *Limits of the Narrative Identity Theory*

To be clear, this Article does not claim that the theory of narrative identity justifies the enforcement of all intimate agreements. For instance, traditional defenses to contract formation or enforcement raise independent reasons (going to defects in the bargaining process, unconscionable terms, etc.) for not enforcing agreements. Depending on how they are drafted, embryo disposition agreements, for example, might fail to anticipate changes in circumstances that justify relief from the terms of the agreement.<sup>241</sup> Moreover, courts may face limitations on the remedies they are able to provide. Even if a gestational surrogacy agreement were enforceable, for example, a court might not be able to order specific performance of a provision requiring the gestational surrogate to abort or refrain from aborting the fetus.<sup>242</sup> The self-protective aspect of the different selves

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239. See Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 392–94 (2012); see also, e.g., *Doe v. XYZ Co.*, 914 N.E.2d 117, 118 (Mass. App. Ct. 2009) (involving an attempt by a user of anonymous sperm to obtain personal information of a donor whose identity a fertility clinic agreed to keep anonymous).

240. See *supra* Part III.A.

241. See RESTATEMENT (SECOND) OF CONTRACTS §§ 261 (excusing performance due to unanticipated impracticability), 265 (excusing performance due to unanticipated frustration of purpose) (1981).

242. See, e.g., Shultz, *Reproductive Technology*, *supra* note 128, at 361–62 (arguing that such a contract could not be specifically enforced); see also Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 336 (1985) (predicting that the government's enforcement of a contract not to terminate a pregnancy would violate the Fourteenth Amendment).

rationale is simply an illegitimate basis not to enforce an otherwise binding agreement.

I am also sensitive to the concern that society's dominant narratives might lead people to commitments that are not truly their own or are problematic because their burdens fall more heavily on certain classes of people. From an early age, for example, girls are taught to give voice to the emotional aspects of their personal experiences to a much greater extent than boys, which affects the way both women and men engage in their activities and understand their experiences.<sup>243</sup> It is therefore possible that certain decisions—e.g., to spend more time at home or to view oneself as a breadwinner—could be determined by these inherited narratives. The fact that societal narratives might privilege certain groups over others raises concerns when a person from a disadvantaged group makes a choice that we perceive to disadvantage him.

This concern is difficult to deny but also difficult to value. First, it would be challenging to separate out pernicious influences from benign ones. Is one's choice of self-narrative more heavily influenced by gendered scripts or by the individual interactions that person had with his parents? Second, it is difficult to determine with confidence whether a person's choice of self-narrative was actually influenced by these external scripts instead of any number of external circumstances, like past experiences that are unique to every person. Third, as discussed above, self-narratives are more or less valuable to a person based on their coherence, not their objective content. The fact that one's choices reflect dominant societal narratives would not seem to affect the ability of a person to craft a more or less coherent self-narrative.

Finally, the deterministic view “flies in the face of both phenomenology, which suggests to each of us . . . that she can change herself or her life direction to some extent, and everyday social observation, which suggests that other people sometimes manage such self-changes.”<sup>244</sup> As DeGrazia has noted, even though all of us live within constraints stemming from our genetic makeup or past experiences, “our choices and efforts often play a significant role in determining what we do and become.”<sup>245</sup> Though preferences influenced by socialization may seem less than fully autonomous, it is often the case that a person would be inclined to identify with those preferences either dispositionally or

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243. See Fivush, *supra* note 193, at 76–82.

244. DEGRAZIA, *supra* note 33, at 91.

245. *Id.*

upon conscious reflection.<sup>246</sup> And presumably, upon reflection, a person could explain and integrate a change of preference into his ongoing self-narrative.

It is therefore unconvincing that some degree of determinism lessens the usefulness of the narrative identity concept. If that person views certain decisions as belonging to her self-narrative, our external skepticism will have little to say about her narrative identity and cannot defeat the purposes that narrative identity serves for her.<sup>247</sup>

### CONCLUSION

Many parties find themselves experiencing a change of heart after entering into a binding agreement. When individuals enter into agreements concerning choices that they deem significant—whether pertaining to intimate matters or resulting in other types of opportunity costs—they may experience strong regret or demoralization over their previous decision. This Article has considered whether changes of mind regarding intimate subject matter ever justify relieving a person of his or her earlier commitments.

The rise of personal identity as a matter of concern in the law of contracts has its roots in two parallel legal developments:<sup>248</sup> the increased recognition of freedom from state interference in the realm of sex, reproduction, and family relationships even outside the status of marriage;<sup>249</sup> and the trend toward privatization in family law.<sup>250</sup> Both developments privilege the rights of individuals to make personal decisions long deemed significant in the law and in society. In *Eisenstadt v. Baird*,<sup>251</sup> the Court

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246. See *id.* at 101–02.

247. I do not argue here that paternalistic interventions are never appropriate, although I think that interventions in the intimate realm often express values that reinforce, rather than challenge, oppressive stereotypes and should therefore be viewed with suspicion. See Matsumura, *supra* note 20, *passim*. The question is whether concerns about narrative identity justify identity-protective interventions, rather than interventions based on concerns related to unconscionability, defects in the bargaining process, legislatively enacted policies, etc.; I answer in the negative.

248. By focusing on these developments, I do not mean to imply that numerous other social and legal changes did not also play a role.

249. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 109–20, 146–55 (2011) (discussing the constitutional protection of decisions to use contraception, engage in same-sex sodomy, abort a fetus, and marry persons of one's choice); Shultz, *supra* note 1, at 266–72.

250. See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444–45 (1992).

251. 405 U.S. 438 (1972).

recognized a “right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>252</sup> Thirty years later, in *Lawrence v. Texas*,<sup>253</sup> the Court framed that concept even more broadly, stating that the right to liberty—which “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”<sup>254</sup>—prevented states from criminalizing consensual homosexual sodomy between adults.<sup>255</sup> As a result of these and related decisions, choices once subsumed in the status of marriage, such as those pertaining to sex and procreation, have become available to individuals both in and outside of marriage.

Meanwhile, courts that had once refused to recognize any private agreement that could undermine the status of marriage, either by changing its duties, encouraging its dissolution, or recognizing alternative arrangements like cohabitation,<sup>256</sup> began to enforce agreements between cohabitants and between spouses that governed the exit from marriages.<sup>257</sup> Around the time of these developments, scholars began to devote more attention to the ways in which private ordering could secure some of the rights and choices previously covered by marital status.<sup>258</sup> Greater enforcement of private agreements in the courts led many scholars generally to conclude that few state-prescribed marital obligations remained that could not be altered by the parties, and that “private norm creation and private decision making ha[d] supplanted state-imposed rules and structures for governing family-related behavior.”<sup>259</sup> Now that people were free to make choices that were

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252. *Id.* at 453 (emphasis added).

253. 539 U.S. 558 (2003).

254. *Id.* at 562.

255. *Id.* at 579.

256. See GROSSMAN & FRIEDMAN, *supra* note 249, at 209–10 (noting courts’ suspicion of the power of private agreements to change the status of marriage); Matsumura, *supra* note 20, at 173 (describing the types of agreements void under the public policy doctrine).

257. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (holding that express agreements of cohabitants could be enforced); *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970) (allowing enforcement of prenuptial agreements notwithstanding marriage’s role as the “foundation of the familial and social structure of our Nation” in light of the “commonplace fact of life” of divorce).

258. See, e.g., Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (considering relationship between private ordering during divorce and laws governing marital dissolution); Shultz, *Reproductive Technology*, *supra* note 128 (providing a comprehensive analysis of potential forms of private ordering in marriage).

259. Singer, *supra* note 250, at 1444. See also Scott & Scott, *supra* note 1, at 1234.

previously forbidden, contract, it would seem, would be a natural partner in giving effect to those choices.

But as I and others have argued, rumors of the marital status regime's demise are greatly exaggerated. Although agreements regarding the disposition of property, like prenuptial agreements, are widely enforced, agreements involving sexual reproduction, child rearing, and spousal duties within an ongoing marriage are often not enforced.<sup>260</sup> It is no accident that concerns about identity have arisen within the context of intimate agreements. Courts and commentators have long struggled to understand how to reconcile individual decision-making in this realm with the entrenched status regimes from which those choices emerged. In other words, it is difficult to determine whether certain choices—like the right to decide whether to reproduce—should be treated as inalienable because they are inherently special or because they were historically treated as outside the power of a person to make. Part II of this Article concluded that the reasons commonly thought to support differing treatment do not do so and that concerns about personal identity cannot relieve a person of these commitments. In short, the liberty to make a range of constitutionally protected decisions does not prevent a person from binding herself to her decisions. Although there may be other remaining reasons not to enforce certain types of intimate agreements, this Article strongly argues that the “centrality of certain choices to personhood” argument is not sufficient.

Paying closer attention to personal identity does not only offer benefits within the context of intimate agreements. Narrative identity also underlies the concept of moral agency, which makes it relevant to aspects of contract doctrine that can be justified with respect to it. The incapacity defense to contract formation, for example, lacks a coherent explanation. The origins and current justifications for the prohibition against enforcing a contract against infants are far from clear.<sup>261</sup> The defense based on mental

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260. See Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 227 (2011) (noting the reluctance of courts to enforce contracts in an ongoing marriage); Matsumura, *supra* note 20, at 191–94; Katherine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 67 (1998) (noting that when parties to a marriage include terms governing housework, sex, emotional support, and other non-financial responsibilities in an agreement, “courts only enforce the provisions governing money”).

261. At common law, individuals under age twenty-one could only incur voidable contractual duties. See RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a (1981). The coherent justification for this prohibition is difficult to find. Modern scholars have generally explained a minor's lack of contractual capacity on the ground that below a certain age, minors lack maturity, competence, or the

illness also admits a wide range of disparate proof.<sup>262</sup> Because the concept of narrative identity explains why it is morally problematic to hold someone accountable for actions that the person is incapable of placing within her self-narrative, it can help to provide that doctrine with greater coherence.

Finally, the concept of narrative identity helps to focus attention on the positive role that contract law plays in facilitating the formation of the self. Margaret Jane Radin has argued that the expectation of continuing control over property can enhance personhood in the following respect: “If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.”<sup>263</sup> Expectations of oneself and others regarding future action also allow people to set goals and establish connections to their future selves. Although the benefits of contracting are often described only in economic or market terms, contracts, just like property ownership, can reflect important personal commitments that affect a person’s sense of self and the quality of his or her self-narrative.

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ability to make self-interested decisions. See Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1851–52 (2012); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 559–60 (2000). Narrative identity theory also has the potential to refine the category of “minors” both in the contract context and beyond. To the extent children who have committed crimes are less able to create a coherent narrative, their ability to act in their own self-interest would be diminished, as would their ability to place their later selves in the same narrative as the one in which the crime occurred. Certain types of punishments, like sentences of life without the possibility of parole, could therefore be unwarranted from a moral standpoint. Cf. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012); Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79 (2013) (discussing the Court’s inconsistent treatment of juveniles and the potential effect of differences between children and adults on recognized penological purposes).

262. RESTATEMENT (SECOND) OF CONTRACTS § 15, cmts. b, c (1981).

263. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968 (1982).



