

# Limited Inalienability Rules

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*Most people’s entitlements are protected by a property rule, which means that their holders can sell them for a price. But some important entitlements are protected by an inalienability rule, and hence cannot be sold under any circumstances. For example, people cannot sell their organs. In most jurisdictions, women cannot be surrogate mothers for a fee (only for reimbursement of costs). People cannot sell their right not to be exposed to highly life-threatening conditions. Most constitutional rights are not transferrable. People cannot reassign their legal entitlements to social benefits provided by the government. Tort victims in many jurisdictions cannot sell their rights to sue. Finally, neither individuals nor governments can sell some types of cultural property to foreigners or to foreign governments.*

*In this Article, we propose and develop an intermediate rule for protecting entitlements—a middle ground between property and inalienability rules—that we call the “Limited Inalienability Rule” (LIR). Under this rule, the holder of the entitlement is free to transfer her entitlement but still possesses an inalienable right to revoke the transfer (or the agreement to transfer) at a later stage, with no penalty. We show that this rule currently exists with respect to a few entitlements, and we suggest that it be employed in additional areas of law. We demonstrate that on many occasions, an LIR serves as a sensible compromise between property and inalienability rules, and can be justified on efficiency and justice grounds.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	703
I. INALIENABILITY AND LIMITED INALIENABILITY IN THE LAW . . . . .	708

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A.	INALIENABILITY . . . . .	709
B.	LIMITED INALIENABILITY . . . . .	711
II.	ENVISIONED EFFECTS OF LIRs . . . . .	714
A.	EFFECTS CREATED BY AN LIR ON WOULD-BE TRANSFERORS . . . . .	714
1.	Changed Circumstances . . . . .	714
2.	New Information . . . . .	715
3.	New Understanding . . . . .	715
4.	Changed Preferences and Values . . . . .	716
5.	Third Parties' Intervention . . . . .	717
B.	EFFECTS CREATED BY AN LIR ON WOULD-BE ACQUIRERS . . . . .	717
III.	THE MITIGATING FUNCTION OF LIRs . . . . .	718
A.	LACK OF INFORMATION . . . . .	718
1.	Justifying Inalienability . . . . .	718
2.	The Mitigating Effect . . . . .	718
B.	PATERNALISM . . . . .	721
1.	Justifying Inalienability . . . . .	721
2.	The Mitigating Effect . . . . .	722
C.	DISTRIBUTIVE JUSTICE . . . . .	723
1.	Justifying Inalienability . . . . .	723
2.	The Mitigating Effect . . . . .	725
D.	PERSONHOOD . . . . .	726
1.	Justifying Inalienability . . . . .	726
2.	The Mitigating Effect . . . . .	729
E.	NEGATIVE EXTERNALITIES . . . . .	730
1.	Justifying Inalienability . . . . .	730
2.	The Mitigating Effect . . . . .	731
F.	EXTERNAL MORAL COSTS . . . . .	732
1.	Justifying Inalienability . . . . .	732

2019]	LIMITED INALIENABILITY RULES	703
	2. The Mitigating Effect . . . . .	733
	G. SUMMARY . . . . .	733
IV.	OBJECTIONS AND REFINEMENTS . . . . .	734
	A. INFEASIBILITY WHEN THE REVOCATION PERIOD IS SHORT . . . . .	734
	B. PROTECTING BUYERS . . . . .	735
	C. STRATEGIC SELLERS . . . . .	736
	D. REFINEMENTS . . . . .	738
	1. Optimal Length of Time . . . . .	738
	2. LIR Conditioned upon Changed Circumstances or New Information . . . . .	739
	3. LIR Coupled with Seller's Liability . . . . .	739
V.	APPLICATION: SELLING CULTURAL PROPERTY . . . . .	740
	A. PREVAILING LAW . . . . .	740
	B. LIR AS A COMPROMISE . . . . .	743
	CONCLUSION . . . . .	746

## INTRODUCTION

Forty-five years ago, in a seminal article, Guido Calabresi and Douglas Melamed introduced the distinction between property, liability, and inalienability rules as different ways of protecting people's entitlements.<sup>1</sup> Under a property rule, no one is allowed to infringe on the holder's entitlement without her consent. For example, my special watch is protected by a property rule, which means that no one can take it from me. If someone were to take my watch, I would be able to enlist the help of the government in getting it back.<sup>2</sup>

Conversely, under a liability rule, other people are allowed to infringe on the holder's entitlement, but if they do so, they must compensate her for the resulting harm. For example, I may be entitled to not have my land be polluted by others. However, in certain instances, people might be allowed to pollute my land so long as they compensate me for the harm I suffered.<sup>3</sup>

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1. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

2. Under common law, this result could be achieved via the tort of replevin. *See* 1 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 73, at 212–13 (2d ed. 2011).

3. *See, e.g.,* *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (allowing permanent damages in lieu of injunction in nuisance case). Under a stronger property rule protection, I could obtain an injunction to force the polluter to halt the damage to my land.

Lastly, under an inalienability rule, even the holder of the entitlement cannot allow others to infringe on his entitlement. Voluntary exchanges are prohibited even if the parties seem to think they would both be better off by making them. For example, I cannot sell my organs, even if I wish to do so (although I can donate a kidney).<sup>4</sup> Similarly, I cannot sell my basic freedoms or my right to vote in elections.<sup>5</sup> Rights are typically made inalienable when the government threatens to criminally prosecute one or both parties to the transaction who seek to make an exchange (or allow an injury) that is legally forbidden. Hence, for example, in many places it is a crime to exchange sex for money—even if both parties are willing and otherwise legally competent to make exchanges.

From the time Calabresi and Melamed published their article, their terminology has dominated the legal discourse in Torts, Contracts, Property, and Remedies.<sup>6</sup> In this Article, we argue that there is a fourth rule for protecting people's entitlements, which lies between property and inalienability rules. We call this rule the "Limited Inalienability Rule" (LIR). Under this rule, the holder of the entitlement is free to transfer her entitlement, but has an inalienable right to revoke the transfer (or the agreement to transfer) at a later stage, return the consideration she received, and bear no penalty. We show that this rule currently exists with respect to some entitlements, and we suggest that it be employed in additional areas of the law.

To illustrate how LIRs work and why it might be important to have such rules, consider the case of surrogate mothers. In most jurisdictions, a woman cannot agree to be a surrogate mother for a specified fee in a conventional market transaction.<sup>7</sup> Instead, she can only volunteer to be a surrogate mother in return for reimbursement of her costs.<sup>8</sup> Put differently, an inalienability rule restricts a

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4. See Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 69 (2004) ("Since the passage of Al Gore's National Organ Transplant Act, it has been illegal in the United States to sell human organs . . .").

5. See Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1324 (2000) (describing the illegality of vote buying in the United States).

6. See, e.g., Ronen Avraham, *Modular Liability Rules*, 24 INT'L REV. L. & ECON. 269 (2004); Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996); Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45 (1999); Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601 (2001); Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135 (2005); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149 (1997); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

7. Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459 (2015).

8. For a comprehensive review of the law's stance regarding surrogacy, in the United States and other jurisdictions, see ALEX FINKELSTEIN ET AL., COLUMBIA LAW SCH. SEXUALITY & GENDER LAW CLINIC, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 8–17 (2016), [www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/](http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/)

woman's freedom to use her womb: she can use it either to carry her own fetuses or surrogate fetuses on a purely *voluntary* basis.

The law could instead protect women's entitlement to their wombs through a property rule. Under such a regime, women could agree to be surrogate mothers for a fee, in a market transaction. Once a valid agreement is entered into, the surrogate mother could have a legal obligation to turn the baby over to the other party upon the birth of the child (an obligation that could be enforced via a claim for specific performance). This sort of contractual agreement is prohibited, however, in most jurisdictions.<sup>9</sup>

The justifications offered in support of such a restriction are similar to those used to explain why people are not allowed to sell their organs. One reason is lack of information: women agreeing to be surrogate mothers might be ill-informed about all the consequences and effects of surrogacy.<sup>10</sup> As a result, they might mistakenly enter into transactions that would decrease—rather than increase—their welfare. Another reason could be paternalistic concerns: even with full information, some women might be tempted by the short-term prospects of profits to become surrogate mothers even if it goes against their longer-run self-interests.<sup>11</sup> A third reason could be distributional effects that society might want to avoid: with a market for surrogacy, poor women might typically serve as surrogate mothers for richer people, and with competition among them, the payment for surrogacy might be relatively low.<sup>12</sup> Lastly, a woman's womb, besides being part of her body, is also part of her personality and identity; the concern exists that allowing her to let other people make use of it for a fee would degrade

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columbia\_sexuality\_and\_gender\_law\_clinic\_-\_surrogacy\_law\_and\_policy\_report\_-\_june\_2016.pdf. As the authors indicate, there are a few U.S. jurisdictions that have completely banned surrogacy, and others that permit it and allow for the reimbursement of expenses (sometimes even reasonable compensation above expenses). *Id.* at 8–10; see also Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423 (2014) (discussing the developing legal, ethical, and social attitudes toward surrogacy arrangements in the United States and elsewhere, and analyzing the applicability of traditional contract law doctrines to such arrangements); Morrissey, *supra* note 7, at 485–503 (overviewing state surrogacy laws).

9. See FINKELSTEIN ET AL., *supra* note 8, at 51–52, 64–83.

10. See Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis*, 16 L. MED. & HEALTH CARE 57, 60 (1988) (arguing that women who enter surrogacy contracts can never truly give informed consent because “she cannot know what it is like to have to give them up after birth”); Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 330, 335 (2005) (same).

11. See FINKELSTEIN ET AL., *supra* note 8, at 26 (“[E]ven well-intentioned intended paren[ts] may unwittingly exploit their surrogates simply by making demands she is not in a position to resist.”).

12. See Jane Maslow Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105, 166–67 (1987) (arguing that poorer women “are likely to radically misperceive, and hence to undervalue, their potentially enduring costs” of bearing and relinquishing a child); Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L.J. 1811, 1819–20 & n.22 (1988) (arguing that “the temptation created by the prospect of being able to eliminate substantial debts and other present economic worries through acceptance of a surrogacy contract may overwhelm the surrogate’s ability to consider fully the future costs of the bargain”).

her as a human being.<sup>13</sup>

However, prohibiting women from being surrogate mothers for a fee is not cost-free. Mainly, such a prohibition infringes on women's autonomy and prevents many childless couples from enjoying the benefits of parenthood.<sup>14</sup> Nevertheless, probably for a combination of the reasons noted above, in the choice between inalienability and property rules, most jurisdictions prefer the former to the latter.<sup>15</sup>

The LIR is a compromise between inalienability and property rules. We argue that in many situations, an LIR would alleviate the concerns emanating from both the property and the inalienability rules; hence, it could offer a better solution for a legal system that takes seriously the concerns entailed by those rules. In our surrogacy example, under an LIR, the surrogate mother would be able to charge a market-rate fee for her services. However, she would be able to revoke her consent to the arrangement until a certain point (for example, terminate the pregnancy until the law disallows abortions, or decide to keep the baby for herself until she gives birth to the baby or delivers it to the biological parents<sup>16</sup>), and this power to change her mind would be inalienable (or immutable). Revoking her consent on time would allow her to undo the previously agreed to transaction. Except for returning the fee she may have already received, revocation would not entail any obligation on her part, such as compensation of the party or parties who hired her.<sup>17</sup>

Why, in the case of surrogacy, might an LIR be preferable to the more extreme inalienability and property rules? Consider first the lack-of-information concern that might be a reason for some jurisdictions to adopt an inalienability rule. With an LIR, surrogate mothers who acquire new information after agreeing to be surrogate mothers would be able to revoke their consent. Furthermore, the "buyers" of the surrogacy services would have strong incentives to provide the surrogate mother with as much information as possible before contracting, to make sure she knows what lies ahead before entering into the transaction. After all, the mother's

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13. See Radin, *supra* note 6, at 1893, 1929, 1932 (arguing that the commodity being sold in the surrogacy interaction is "womb services" and that "commodification of women's reproductive capacity is harmful for the identity aspect of their personhood"). There could be also other reasons for inalienability, such as negative externalities and external moral costs. See *infra* Sections III.E–F.

14. Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 731, 740 (2003) (arguing that allowing women to enter into surrogacy agreements and "to define motherhood on [their] own terms" promotes their autonomy).

15. FINKELSTEIN ET AL., *supra* note 8, at 51–52 (showing that, in most cases, reimbursement or compensation for reasonable expenses is the norm, mainly due to dignity and exploitation considerations).

16. For a discussion on short revocation periods, see *infra* Section IV.A.

17. Though this is a "pure" rule, we discuss other variations of LIRs as well. See *infra* Section IV.D.1. Notably, however, having an LIR is not cost free. In particular, the "buyers" of the services, the biological parents, might sometimes end up worse off under an LIR than under either an inalienability or a property rule. The interests of the newborn baby should also be considered. See *infra* Section IV.B (regarding protecting buyers).

late revocation would affect the “buyers” the most. An LIR would mitigate the risk that the surrogacy arrangement would decrease surrogate mothers’ welfare.

Consider now the paternalistic concern. With an LIR, this concern would diminish: the surrogate mother would have a chance to acquire some experience of being a surrogate mother, and if she feels it is too physically or emotionally difficult for her to proceed with the process, she would be able to halt it until a certain point when her consent becomes legally nonrevocable. With the surrogate having the right to revoke, parties seeking a surrogate are likely to search more carefully to find a willing surrogate who already has a clearer sense of her own long-term interests.

Consider next the expected distributional effects of a property rule that might be a reason for some legal systems to adopt an inalienability rule. Here too an LIR might be a good compromise between inalienability and property rules. With an LIR, the biological parents would know that the surrogate mother can revoke the deal and leave them with uncompensated losses. To diminish the chances of revocation, they would likely offer the surrogate mother a generous fee. Ultimately, she might end up with a better deal—the right to revoke the deal and a generous fee—than she would have received under a property rule.<sup>18</sup>

Finally, as to the personality (or identity) concern, the ability of the surrogate mother to terminate her pregnancy within the bounds of the law (or not to deliver the baby to the buyers after birth) with no penalty would allow her to maintain control over her body, making the transaction less intrusive and more respectful of her personal autonomy.<sup>19</sup>

Of course, there are legal systems that might prefer to retain either the inalienability or the property rules, even when an LIR is a viable option. Moreover, some legal systems might limit inalienability in other ways, for example, by allowing the transfer of some entitlements only to certain recipients (for example, allowing organ donations to relatives only), by requiring prior governmental approval for the transfer of the entitlement (for example, requiring a specific permit for surrogacy arrangements), or by setting a minimum fee for the exchange (for example, setting minimum prices for organs being sold). However, we claim that an LIR is an option that should exist among others in the legal arsenal, representing some form of middle ground between, and often preferable to, the two extreme solutions. Given this option, the legal system might not only convert many existing inalienability rules into LIRs, but also convert some existing property rules into LIRs. In our surrogacy example, an LIR might be preferred not only by jurisdictions that currently apply an inalienability rule, but also by jurisdictions that apply a property rule.

The potential of converting many inalienability rules into LIRs is huge. We suggest that legislatures examine carefully the existing inalienability rules—and

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18. This argument is somewhat counterintuitive. See *infra* note 105 (discussing the potential change to surrogate mothers’ bargaining power).

19. The interests of the newborn baby should also be considered, as well as those of the biological parents. See *infra* Section IV.B.

some of the property rules—and consider whether they should be converted into LIRs.

Entitlements, which are currently protected by inalienability rules, are abundant. People cannot sell their organs. In some jurisdictions, prostitution is prohibited. Most constitutional rights and political participation rights are not transferrable. For example, people cannot waive their First Amendment rights (except in limited contexts) and cannot sell their rights to vote. Nor can people transfer their civic duties (and rights) to serve on a jury or in the military. People cannot reassign their legal entitlements to government-provided social benefits. Tort victims in many jurisdictions cannot sell their rights to sue. And individuals, as well as governments, cannot sell some types of cultural property to foreigners or to foreign governments.<sup>20</sup> In some of those cases and in many others, LIRs might replace inalienability rules.

This observation is not to say that LIRs do not currently exist at all. Take plea bargains as an example. One could imagine a legal rule that precludes “selling” the accused’s right against self-incrimination to the prosecution, thereby protecting it through an inalienability rule. Instead, this right is protected by an LIR: the accused could sell his right through a plea bargain with the prosecutor, but he is allowed to change his mind and withdraw his planned guilty plea until the court accepts the plea and convicts the accused. Other examples are at-will employment contracts and some types of consumer transactions, whereby the consumer may revoke the deal within a limited period of time.<sup>21</sup> We believe there could be many more LIRs, and in the remainder of this Article we explore the justifications for LIRs and indicate the types of cases for which they are best suited.

The Article proceeds as follows: In Part I we provide an account of inalienability rules and LIRs in prevailing law. In Parts II and III we set the theoretical framework for LIRs and explore the conditions under which they should apply. In Part IV we discuss a few objections to LIRs, and as a response, refine our proposal and discuss several variants of LIRs. In Part V we apply our theory to the case of governments’ and citizens’ sale of cultural property, which some countries currently regulate by an inalienability rule and other countries by a property rule. We conclude by summarizing our arguments, and calling on courts and legislatures to consider adopting LIRs in various areas of the law.

## I. INALIENABILITY AND LIMITED INALIENABILITY IN THE LAW

In this Part we provide a brief review of inalienability rules in the law. We then discuss a few other existing rules, which can be best interpreted as LIRs. In the remaining Parts of the Article, we establish the claim that there is room for more LIRs in the law.

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20. See *infra* Part V.

21. See *infra* Section I.B.



## A. INALIENABILITY

Most entitlements are alienable; the power of an individual to transfer her entitlement is almost a natural consequence of being its holder. This power promotes her autonomy, as well as her own welfare and that of others. Conversely, any limitation on the power to transfer entitlements seems to curtail the holder's autonomy, thereby reducing social welfare: the value of the entitlement to its holder and to society at large seems to decrease once the entitlement becomes inalienable.

Nevertheless, many entitlements are inalienable. People cannot sell their organs.<sup>22</sup> They may donate some of their organs—such as kidneys<sup>23</sup>—but an organ donation that substantially risks the donor's life is prohibited.<sup>24</sup> Likewise, people are not allowed to subject themselves to the high risk of death or severe bodily injury for money.<sup>25</sup> For example, a transaction between a polluter and a pollutee, allowing the former to create a high level of pollution that significantly shortens the latter's life expectancy, would be considered illegal and unenforceable.<sup>26</sup> As already discussed in the introduction, women in most jurisdictions cannot be surrogate mothers for a market-rate fee but can engage in surrogacy in return for reimbursement of their costs.<sup>27</sup> Although prostitution is allowed in

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22. See National Organ Transplant Act of 1984, 42 U.S.C. §§ 273–274 (2012); UNIF. ANATOMICAL GIFT ACT § 10(a) (UNIF. LAW COMM'N 1987); see also Peter Aziz, Note, *Establishing a Free Market in Human Organs: Economic Reasoning and the Perfectly Competitive Model*, 31 U. LA VERNE L. REV. 67, 68 (2009) (“Under the current system, the only available organs are ones that are donated, because it is illegal to sell one's organs in the United States.” (footnote omitted)).

23. See Erika L. Rager, *The Donation of Human Organs and the Evolving Capacity for Transplantation: Exciting Developments and Future Prospects*, 65 N.C. MED. J. 18, 22 (2004) (noting that the current donor system in the United States is an “opt-in” system that allows a person to opt into donating his or her organs).

24. See Margaret R. Sobota, *The Price of Life: \$50,000 for an Egg, Why Not \$1,500 for a Kidney? An Argument to Establish a Market for Organ Procurement Similar to the Current Market for Human Egg Procurement*, 82 WASH. U. L.Q. 1225, 1229 (2004) (discussing the conditions for allowing organ donation from a live individual, including low risk to the donor). Blood may be sold in the United States, but the demand for paid-for blood is not high. Hospitals do not use it because patients fear that paid-for blood has a higher risk of viral contamination, and their fear may be well-founded. See Elizabeth Preston, *Why You Get Paid to Donate Plasma But Not Blood*, STAT (Jan. 22, 2016), <https://www.statnews.com/2016/01/22/paid-plasma-not-blood/> [<https://perma.cc/G7LG-C64X>]. Blood used in transfusions is donated, a practice that is permitted and indeed encouraged. But it is permissible and commonplace to sell blood plasma. Compared to blood, plasma is more heavily processed before being utilized; the additional processing diminishes the contamination risk. See *id.*

25. See, e.g., OSHA General Safety and Health Provisions, 29 C.F.R. § 1926.20(a)(1) (2018) (requiring that “no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety”).

26. Cf. OSHA Occupational Health and Environmental Controls, 29 C.F.R. § 1926.55(a) (2018) (requiring that “[e]xposure of employees to inhalation, ingestion, skin absorption, or contact with any material or substance at a concentration above those specified in the ‘Threshold Limit Values of Airborne Contaminants for 1970’ of the American Conference of Governmental Industrial Hygienists, shall be avoided”).

27. See *supra* note 8 and accompanying text.

many jurisdictions, it is prohibited in others.<sup>28</sup>

Constitutional rights are not for sale, but many are partially limited. For example, government employees might be restricted in their speech in various ways.<sup>29</sup> But could a politician pay a journalist to silence her criticism against him or against his political party? We believe the answer is no. The same is true with respect to voting: paying someone to vote in the election in favor of the payer's party or candidate is prohibited and considered a crime.<sup>30</sup> Additionally, there are some civil duties that are not transferrable—including jury duty or a duty to serve in the military.<sup>31</sup> By contrast, in the past, people were allowed to relieve themselves of their military duties by paying others who were willing to shoulder this burden.<sup>32</sup>

Many citizens are entitled to social benefits from the government, such as unemployment compensation and social security. These entitlements are typically protected by inalienability rules; in other words, these rights may not be assigned to third parties.<sup>33</sup> Litigation rights are often protected by inalienability rules as well.<sup>34</sup> Generally, people cannot waive their rights of access to courts, although arbitration clauses are commonly enforceable.<sup>35</sup> Under the common law, tort suits cannot be assigned.<sup>36</sup> Artists and authors may sell their copyrights in their works, but the moral rights, including the right to the integrity of their

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28. See Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 526–27 (2000) (“The exchange of sexual services for money is the only form of consensual adult sexual activity that is systematically subject to criminal sanctions in the United States . . .”).

29. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (concluding that the speech of a public employee was not protected under the First Amendment, because his statements were made as part of his position as a district attorney, not as a private citizen).

30. See, e.g., 18 U.S.C. § 597 (2012); see also Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 987–88 (1985) (explaining that the power to vote in general elections is protected by an inalienability rule); Hasen, *supra* note 5, at 1324.

31. See Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 967 (1985) (explaining that the need to comply with civil duties such as jury service or the military draft is protected by an inalienability rule).

32. See *id.* at 936 (describing how “during the Civil War, persons drafted into the army were permitted to buy substitutes”).

33. See Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 93 (2011) (arguing that these social benefits are “considered inherently personal and inalienable”).

34. See *id.* at 91 (asserting that the right to trial is protected by an alienability rule).

35. See David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 746–65 (2012) (discussing tension between arbitration clauses and the justification of inalienability of federal statutory rights).

36. See Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 731–32 (2005) (stating that the current rule in most jurisdictions is that a personal tort claim cannot be bought or sold). Today, however, some jurisdictions allow such assignments with certain limitations. See *id.* at 700 (“Courts have generally shown more willingness to allow assignment of contract claims than of tort claims and, within the latter category, more willingness to allow assignment of property damage claims than of claims for personal injury.” (footnotes omitted)); see also Michael I. Krauss, *Alternate Dispute Financing and Legal Ethics: Free the Lawyers!*, 32 MISS. C. L. REV. 247, 248 (2013) (describing litigation rights as rights governed by modified inalienability because plaintiffs could waive them through settlements).

work, remain their own and can be waived—but not sold.<sup>37</sup> Finally, many jurisdictions restrict selling cultural property to foreigners or to foreign governments.<sup>38</sup>

As the examples above imply, inalienability is often partial.<sup>39</sup> Thus, the use of some entitlements is restricted.<sup>40</sup> Some other entitlements can be transferred to certain people but not to others.<sup>41</sup> Still other entitlements can be transferred as gifts or donations but cannot be sold (for example, the entitlement to one's kidney),<sup>42</sup> and vice versa (for example, the entitlement to one's property when bankruptcy proceedings are imminent).<sup>43</sup> For our purposes, partial inalienability rules are included in the broad category of inalienability,<sup>44</sup> and our proposed LIR applies to them as well.

#### B. LIMITED INALIENABILITY

Though legal writers have noted that inalienability can be partial in some respects,<sup>45</sup> the legal literature has not suggested that partial inalienability could or should manifest itself by the holder's right to revoke her consent to the transfer and reclaim her entitlement. That is the new idea we offer here.

The law, however, provides many rules best classified as LIRs. Take, for example, employment contracts. The employee "sells" her freedom of occupation to her employer and subordinates herself, in many respects, to her employer's will. But if the employee is free to revoke her consent and quit at any time without penalty (perhaps only after giving notice), and because this right to quit may not be waived, such contracts are best understood as illustrations of an LIR.

37. See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997) (analyzing pros and cons of making moral rights inalienable).

38. See *infra* Part V.

39. See Rose-Ackerman, *supra* note 31, at 935 (arguing that there are entitlements that are only partly inalienable, and suggesting a "modified alienability" conceptualization, which is recognized by partial inalienability whereby "sales are forbidden, but gifts are permitted and may even be encouraged by state policy").

40. See *id.* at 954–55 (presenting entitlements whose use is restricted, such as controls on the use of historic buildings and undeveloped land, as well as land-use zoning laws that prevent owners from using their land for certain purposes such as a store or a factory).

41. For example, Israeli law forbids family members from becoming each other's surrogate mothers. See David A. Frenkel, *Legal Regulation of Surrogate Motherhood in Israel*, 20 MED. & L. 605, 611 (2001).

42. See Rose-Ackerman, *supra* note 31, at 935 (illustrating such modified inalienability rules in the contexts of "transplantation of body parts, the adoption of babies, and the preservation of endangered species").

43. See *id.* (giving the example of "an insolvent person or firm [that] cannot give away valuable assets").

44. Cf. Fennell, *supra* note 6, at 1408 (explaining that inalienability rules can be adjusted in various ways).

45. See Radin, *supra* note 6, at 1919 (discussing incomplete commodification in labor regulation); Rose-Ackerman, *supra* note 31, at 935 (discussing modified inalienability and pure property with ownership restrictions).

A second example is the right of withdrawal in consumer contracts. In most jurisdictions, a consumer who purchases products in a “door-to-door” or distance transaction has an immutable right to withdraw the contract within a specified period of time, return the product, and get her money back (or simply void the otherwise valid contract that she signed at the door).<sup>46</sup> One way to classify this right is as an LIR: the consumer is free to use her money to buy products even in a door-to-door or distance transaction, but can revoke her consent within a certain period of time and undo the transaction without penalty.<sup>47</sup>

A third example is a plea bargain. In the past, plea bargains were not permitted. Stated otherwise, the accused’s right not to engage in self-incrimination was inalienable, in the sense that he could not “sell” it to the prosecution.<sup>48</sup> He was allowed to confess his guilt, of course, but not in return for a promise by the prosecution to seek a reduced sentence. Today, permissible plea bargains are widespread.<sup>49</sup> However, rather than concluding that this change has made the right of self-incrimination alienable, we believe the regime governing plea bargains is better characterized as an LIR. Although the accused may enter into an agreement with the prosecution to plead guilty in return for an undertaking by the prosecution about the sentence it will request, the accused may revoke this agreement at any time before the court acknowledges the plea bargain and convicts him based on the plea bargain.<sup>50</sup> Because this right of the accused to revoke his consent is inalienable, an LIR protects his right against self-incrimination.

Copyright law provides a final example. Under the Copyright Act of 1976, an author who transferred her copyright could revoke the transfer after thirty-five years with no penalty.<sup>51</sup> If, however, the author fails to revoke within a period of five years (until forty years following the transfer), she forfeits her right of revocation and the transferee owns the copyright for an additional thirty-five years (until seventy-five years after the transfer).<sup>52</sup> Significantly, this right of revocation

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46. See Shirly Levy, *The Illusory Promise of Money Back Guarantees: Comparative Research, Economic and Behavioral Analysis & a Reform Proposal* 15–16 (Nov. 2015) (unpublished doctoral dissertation, Tel-Aviv University) (on file with authors) (describing U.S. and European laws on this matter).

47. Money as such is fully alienable, of course. But in this specific context, described above, it is protected by an LIR.

48. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 6 (1979) (explaining that plea bargaining became an accepted method for resolving criminal disputes only “at the end of the nineteenth century and beginning of the twentieth”).

49. See LINDSEY DEVERS, U.S. DEP’T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

50. FED. R. CRIM. P. 11(d) (“A defendant may withdraw a plea of guilty . . . (1) before the court accepts the plea, for any reason or no reason; or (2) after the court accepts the plea, but before it imposes sentence . . . .”); *id.* 11(e) (“After the court imposes sentence, the defendant may not withdraw a plea of guilty . . . .”).

51. 17 U.S.C. § 203(a)(3) (2012). We thank Oren Bracha for this example.

52. *Id.*

is inalienable.<sup>53</sup>

Two distinctions must be made. First, in a unilateral contract, one party is bound by the contract; the other may change her mind and withdraw anytime without penalty. For example, *A* might offer *B* a reward if he finds *A*'s missing dog. *B* might accept the offer and even make some efforts to find the dog. But the contract does not bind *B* in any respect: he can stop searching for the dog anytime without penalty.<sup>54</sup> Yet, because *B could*, if he so chose, bind himself to search for *A*'s dog via a bilateral—not unilateral—contract, *B*'s right to *not* search is alienable. Had it been inalienable, the right would have embraced an LIR. Because it is not, it represents a property right.

The second distinction is between an LIR and limited remedies. On many occasions, remedies are limited. For example, courts often enforce contracts through damages awards instead of specific performance.<sup>55</sup> Thus, employment contracts are typically enforced only through damages awards. The same is true with tort cases: even when an injunction against a polluter is possible, some courts might award damages in lieu of an injunction.<sup>56</sup> In other cases, damages might be less than fully compensatory. For example, breaching a promise to marry might trigger an award of damages in some jurisdictions, but even then the breaching party might only have to compensate the aggrieved party for out-of-pocket expenses (reliance damages) rather than lost expectations (expectation damages).<sup>57</sup>

In many of these cases, the limited remedy is immutable: the parties cannot agree in advance to have a “full” remedy. Would this make it an LIR? The general answer is no: when remedies are limited, a transfer of the entitlement is permitted with no right of its holder to revoke her consent. However, as we explain

53. *Id.* § 203(a)(5) (“Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”); see also Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 79–81 (2013) (discussing the purported asymmetry of information, sophistication, and experience between artists and copyright purchasers as a misguided justification for providing the former with an inalienable right of revocation up to thirty-five years post-sale).

A related LIR example is the Chinese custom of *dian*, which was Chinese law until 1949. See Robert C. Ellickson, *The Costs of Complex Land Titles: Two Examples from China*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 281, 281 (2012). According to this custom, a seller of land retains the option of repurchasing it at a later date at the original price. *Id.* at 287–88. In many cases, this right was inalienable and, in theory, perpetual. *Id.* at 287, 289. Ellickson’s view is that “[t]he right to redeem ancestral land . . . can be viewed as a paternalistic method of assuring the availability of at least some resources to the descend[ants] of members of landholding families.” *Id.* at 294. Ellickson, who considers this rule inefficient, *id.* at 290–91, attributes its survival into post-commercialization China to social, political, and cultural factors, *id.* at 295. We thank Lee Fennell for this example.

54. See E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 72 (8th ed. 2013) (discussing the differences between bilateral and unilateral contracts).

55. See *id.* at 316 (“It is extraordinary for a contract claimant to be entitled to specific performance . . .”).

56. See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970) (awarding damages in lieu of injunction in nuisance case).

57. See, e.g., *Wildey v. Springs*, 840 F. Supp. 1259, 1268 (N.D. Ill. 1994) (“Wildey may only recover actual damages resulting from Springs’ breaking the engagement.”) *rev’d* on other grounds, 47 F.3d 1475 (7th Cir. 1995).

in Part IV, some of the advantages of an LIR can be achieved through limited remedies, and it is possible to classify a rule that allows an inalienable right to revoke the deal, coupled with a limited remedy, as a variant of an LIR.<sup>58</sup>

## II. ENVISIONED EFFECTS OF LIRs

If the original owner of an entitlement retains the power to reclaim the entitlement he transferred, or promised to transfer, the reasons for a legal system to bar such a transfer altogether may weaken. Under such circumstances, an LIR, rather than inalienability or a property rule, could be the socially optimal solution.

In this Part, we explain the effects created by an LIR on the holder of the entitlement as well as on its would-be-acquirer. In Part III we show how those effects mitigate the concerns associated with property rules that inalienability rules seem to address: lack of information, paternalism, distributive justice, personhood, negative externalities, and external moral costs.<sup>59</sup>

### A. EFFECTS CREATED BY AN LIR ON WOULD-BE TRANSFERORS

An LIR provides the holder of the entitlement with additional time to reconsider the transfer and revoke it with no penalties, if she so wishes. The lapse of time has several distinguishable effects that might affect the holder's wish to revoke the transfer. We describe five of them.

#### 1. Changed Circumstances

After a seller enters into a contract to sell an entitlement, circumstances might change. Such changed circumstances might convince the seller to revoke the deal. For example, someone might agree to sell or donate a kidney, only to later

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58. See *infra* Section IV.D.3.

59. The concerns associated with property rules that we discuss, which inalienability rules might address, do not exhaust all the concerns associated with property rules. Instead, we focus on the core concerns that an LIR might address. In a groundbreaking article, Lee Anne Fennell exposes unappreciated advantages of inalienability rules. Fennell, *supra* note 6. Fennell describes many situations in which alienability of entitlements provides *ex ante* incentives to exploit would-be buyers in a socially inefficient manner. *Id.* Fennell categorizes those entitlements as "anxiously alienable goods." *Id.* at 1413. For example, in a bilateral-monopoly situation, people might be motivated to purchase an entitlement knowing that at a certain point they could hold out and extort a potential buyer. *See id.* at 1423. When such risk exists, inalienability of entitlements might be a possible solution. *See id.* at 1424. Fennell also shows how inalienability rules could be an effective solution for cases of overuse of public resources and of inefficient maintenance of public goods. *Id.* at 1429–38. Though persuasive, Fennell's argument for inalienability rules does not address LIRs; it covers only other variations of inalienability. *Id.* at 1457–63. This is likely because LIRs would be a poor solution in Fennell's cases. For other advantages and disadvantages of inalienability, see Ayres & Madison, *supra* note 6, at 106–08 (arguing that inalienability "enhance[s] both efficiency and equity" when "people who are owed duties (potential plaintiffs) and people who owe duties (potential defendants) may threaten inefficient performance . . . to improve their individual payoffs"); Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 307 (2004) (discussing the effects of inalienability of human organs on the involvement of black markets and the injustice this system creates); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 687–88 (1998) (discussing the efficiency of bundling several property rights and disallowing the owner to unbundle them through sales).

contract a disease that endangers his remaining kidney;<sup>60</sup> the government of a poor country might in desperation agree to sell the country's cultural property, only to prosper a few years later;<sup>61</sup> a woman might agree to be a surrogate mother, only to sustain injury during delivery that renders her incapable of giving birth again.

Under an LIR, in these and other circumstances, the seller could choose to revoke the deal. To be sure, under a property rule, too, these concerns might lead a sophisticated seller to insist on incorporating into the sale contract a clause allowing her to revoke the deal without penalty (at least within a definite period of time). But the asymmetry of information and bargaining power might hinder the incorporation of such a clause. An LIR securing the seller's power to revoke the deal could be more effective than a property rule in enabling the seller to regain her entitlement when circumstances change.

## 2. New Information

Other cases might involve not changed circumstances but new information that the seller was unaware of as the deal was made. Such information might convince the seller to revoke the deal. New information typically relates to existing rather than future circumstances. Most changed circumstances could be reframed as new information, in which case the analysis of new information would mirror the analysis of changed circumstances. A seller of her kidney might, unbeknownst to her at the time of contracting, suffer from a disease endangering her kidneys.<sup>62</sup> If she gains this information before the kidney is transferred, an LIR would allow her to revoke the deal. Likewise, a woman may agree to be a surrogate for a fee without knowing that she has a condition preventing her from giving birth to more than one child. If she learns of the condition in time, an LIR would allow her to revoke the agreement.

## 3. New Understanding

What often makes a difference to the seller is not a new circumstance or new information, but a new understanding that, in retrospect, the deal was a mistake. New understanding might only be gained after the deal has been made, the result of experience acquired during or immediately after the process of executing the transfer. Such understanding might involve a sense of "seller's remorse." For example, having signed the relevant papers, a seller of her kidney might feel vulnerable and even depressed upon confronting the prospect of a kidney-less

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60. See Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 106–07 (2004) (“[R]esponsible regulation could prevent [organ] sellers from making hasty decisions by requiring reasonable ‘cooling-off periods’ prior to sale . . . to ensure that their decision is an enduring one.”).

61. See *infra* Section V.A.

62. Although in most places the donor undergoes medical tests before donation. See Robert Steinbuch, *Kidneys, Cash, and Kashrut: A Legal, Economic, and Religious Analysis of Selling Kidneys*, 45 HOUS. L. REV. 1529, 1594 (2009).

future.<sup>63</sup> Once they make the transfer, a government that sold cultural property may come to realize that its citizens resent the sale.<sup>64</sup> And the surrogate mother might not realize how emotionally attached she will become to the fetus or, later, to the newborn baby.<sup>65</sup>

Note that these three examples could also be viewed as cases of changed circumstances or new information. But new understanding is distinct in that it is all about the seller's state of mind. Sellers might recognize that the potential for new information or circumstances will affect their consideration of a deal, but they are typically less cognizant of how strongly they will feel about the deal after it is done and how long such feelings will last.<sup>66</sup> Therefore, under a property rule, the chances that they would protect themselves by incorporating a contractual right to revoke the deal are smaller with respect to the risk of new understanding than with respect to the risks of changed circumstances and new information. Hence, an LIR is crucial for securing sellers the right to revoke a deal if they acquire a new understanding.

#### 4. Changed Preferences and Values

Even without changed circumstances, new information, or new understandings, preferences and values might change, even independent of the deal made. For example, after agreeing to transfer a kidney, but before the transfer takes place, the transferor might gain a new appreciation for his immediate and future health; after agreeing to be a surrogate mother, a woman may discover strong, once-dormant motherhood preferences;<sup>67</sup> and after donating sperm, the donor may develop an antipathy towards his donation.<sup>68</sup> In all those cases, it is not a

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63. *But see* Michael T. Morley, Note, *Proxy Consent to Organ Donation by Incompetents*, 111 YALE L.J. 1215, 1223 (2002) (citing Ingela Fehrman-Ekholm et al., *Kidney Donors Don't Regret*, 69 TRANSPLANTATION 2067, 2069 (2000), in which almost all kidney donors reported that they did not regret their decision to donate).

64. *See* Helena Smith, *Greece Protests over Government Plans to Sell Off Historic National Buildings*, GUARDIAN (Mar. 16, 2014, 3:44 PM), <https://www.theguardian.com/world/2014/mar/16/greece-protests-sell-off-historic-buildings> [<https://perma.cc/Q796-2YUH>] (reporting that the Greek government planned to sell historical buildings to cover its debts and that Greek citizens protested against this plan).

65. *See* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 235–36 (2012) (noting that the emotional significance of pregnancy may turn on “a hypothesized bonding between woman and fetus during pregnancy”).

66. *See* Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 167 (2005) (presenting recent psychological research indicating people's incapability to predict the intensity and duration of future feelings and emotions regarding decisions they make in the present).

67. *See* Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 49–50 (2007) (discussing the possibility that a surrogate mother might change her preferences during her pregnancy due to unpredicted emotions involved with pregnancy and childbirth).

68. The sperm example is based on a decision delivered by the Israel Supreme Court in *Doe v. Ministry of Health*. HCJ 4077/12 *Doe v. Ministry of Health* (2013) (Isr.) (Nevo, February 5, 2013). A few years after the donation, a sperm donor became religiously orthodox and objected to making any use of his sperm. *Id.* at 4. The to-be-recipient of his sperm was a woman who, through a sperm bank, had previously used the same donor's sperm to produce a daughter. *Id.* at 6. According to her contract with the bank, she was entitled to use the same sperm, then possessed by the bank, five more times. *Id.* Her



new understanding by the seller of what maximizes his or her existing preferences or values; rather, the preferences or values themselves have been changed.

Sellers are typically not aware of the possibility that their preferences and values may change.<sup>69</sup> Because of this ignorance, an LIR would protect sellers better than a property rule.

### 5. Third Parties' Intervention

Finally, allowing for a lapse of time after contracting but before the transaction becomes irrevocable allows third parties whom the deal might affect to intervene and counteract it. For example, the citizens of the country that sold cultural property might convince the government to revoke the deal by appealing to the cultural assets' importance to national identity.<sup>70</sup>

#### B. EFFECTS CREATED BY AN LIR ON WOULD-BE ACQUIRERS

We must appreciate, moreover, that the conduct of someone seeking to acquire an entitlement from another can be impacted by the transaction being governed by an LIR rather than a property rule.

With an LIR, the party seeking to obtain the entitlement might well make efforts to convey information about existing circumstances to the seller, or even to generate such information, to reduce the chances that the seller would revoke the deal at a later stage, leaving the acquiring party with uncompensated losses.<sup>71</sup> To illustrate, someone needing a kidney, or the would-be parents seeking surrogacy services, have an incentive to generate medical information for the other party, and even might be willing to cover the costs of medical tests that perhaps that party may not be willing to incur. In addition, so as to reduce the chances of revocation, the acquiring party may be willing to make the deal as attractive as possible to the other party so as to reduce the chances that the other party will at some point invoke her LIR power to revoke the arrangement. This could mean offering not only more money to the transferor, but also some other benefits.<sup>72</sup> For example, the party seeking to obtain cultural property subject to an LIR might offer to care for it in an especially appealing way.

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interest was natural: she wanted her future child to carry the same genetic load of his or her sister. *Id.* at 8. The Supreme Court decided in the donor's favor, however, allowing him to revoke the deal. *Id.* at 37. The Israel Supreme Court protected the donor's sperm by what we call in this Article an LIR. We thank Amnon Reichman for referring us to this case.

69. See Blumenthal, *supra* note 66, at 170–72 (presenting research indicating people's poor capability to predict future emotional experiences).

70. See Smith, *supra* note 64; *The Ethics of Cultural Heritage*, STAN. ENCYC. OF PHIL. (July 12, 2018), <https://plato.stanford.edu/entries/ethics-cultural-heritage/#CollIdenInalCultProp> [<https://perma.cc/4MRR-HWR9>] (“Proponents of cultural nationalism typically use claims about the special national character of cultural heritage to argue in favor of nationalist retention policies that restrict or limit the export or sale of cultural heritage.” (internal citation omitted)); see also *infra* Part V.

71. See *infra* Section III.A.2.

72. We elaborate on the significance of this effect later in this Article. See *infra* Section III.C.2.

### III. THE MITIGATING FUNCTION OF LIRS

In this Part of the Article, we explain how the effects of an LIR discussed in Part II could mitigate the concerns that lead jurisdictions to prefer inalienability over property rules. This discussion is not to say that those concerns are always mitigated or mitigated to a degree that categorically proves that an LIR is preferable to an inalienability rule. Much depends on the theory—or theories—one holds for justifying inalienability. In the following sections, we discuss the various concerns and consider how and when an LIR could mitigate each.

#### A. LACK OF INFORMATION

##### 1. Justifying Inalienability

One possible justification for making some entitlements inalienable is the concern that entitlement holders lack information, causing them to sell their entitlement too easily, or too cheaply. Such tendencies could adversely affect both the holder and social welfare in general.<sup>73</sup>

The lack of information justification might apply to examples like organ transfer, high-risk occupations, surrogacy, and the assignment of a tort claim.<sup>74</sup> In each example, an entitlement holder might enter into a transaction even if they would not have done so had they been better informed.<sup>75</sup>

##### 2. The Mitigating Effect

People commonly enter into deals without realizing the risks to life they are exposed to. If they were better informed, they would either reject the deal outright or accept it only for higher compensation or if risk-reduction measures were taken by the other party. One way for governments to avoid such deals is to ban them altogether. In other words, government would protect the entitlement not to be exposed to high risks to life by an inalienability rule. A more moderate approach is to make sure that people making such deals are fully aware of what they are doing. This aim could be achieved in a centralized way—through regulations and licenses<sup>76</sup>—or in a decentralized way by imposing disclosure duties on buyers

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73. See *supra* note 10 and accompanying text.

74. Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435, 505 (1995) (arguing that the market of tort victims' rights-to-sue will demand that sellers develop information and make it available to potential buyers in a secondary market); Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, 63 DEPAUL L. REV. 527, 528–29 (2014) (arguing that with respect to unmaturing legal rights, regulation should account for the seller having sufficient information to set an appropriate price).

75. See, e.g., Elizabeth Burstein, *Should Contract Pregnancies Be Legally Enforceable?: An Assessment of the Gender Inequality Hypothesis in the Asymmetry Thesis*, 2 RES COGITANS 17, 21–22 (2011) (arguing that women should have necessary information and requisite bargaining power before entering into surrogacy contracts); Jennifer Damelio & Kelly Sorensen, *Enhancing Autonomy in Paid Surrogacy*, 22 BIOETHICS 269, 270, 275–76 (2008) (proposing that at a minimum, surrogate mothers should be required to take a mandatory class on “contract pregnancy” before entering into a surrogate arrangement).

76. See, e.g., 30 U.S.C. § 825(a)(1) (2012) (requiring that miners with no previous mining experience receive no less than forty hours of training, including instruction on their statutory rights and workplace hazards).

who are better informed of the risks than sellers. LIRs comprise another decentralized way to mitigate the lack of information concern and, as we explain below, they have some clear advantages over other alternatives.<sup>77</sup>

The lapse of time embodied in an LIR provides opportunities to sellers to acquire new information and revoke the deal.<sup>78</sup> The straightforward consequences of an LIR in the high-risk-to-life context would be that individuals who expose themselves to such risks and later acquire information about the harsh consequences they might suffer would be able to make use of that new information to revoke the deal without penalty before they actually suffer the serious harm. Thus, the risks resulting from lack of information at the time of contracting would be diminished. But, more interestingly, the buyers would often have strong incentives to provide information to sellers at the outset about the potential risks, knowing that they might be better off with no deal at all than with a deal that the seller could revoke later. Therefore, an LIR might be more effective than a property rule coupled with duties of disclosure imposed on buyers, in securing sellers' informed decisions to depart of their entitlements. Below, we explain how this could work.

Suppose an employer seeks to hire employees for three years to perform a high-risk project that has significant social value. Assume that to prepare an employee for his job, the employer must invest substantial resources in his training. Now imagine three possible legal regimes: an inalienability rule, a property rule, and an LIR. Under an inalienability rule, the employer would not be able to hire employees to work on the project, because it would be illegal to agree to such risks. At least in some cases, however, this might be a welfare-reducing solution for both employers and would-be employees, and the socially desirable project might not be undertaken.

Under a property rule, the employer would be able to hire employees as long as she pays them a salary that convinces them to take up the uncertain risks involved in the work. In some cases, employees might sufficiently underestimate the risks and agree to be exposed to them for inadequate salaries or on different safety terms than they would have agreed to had they been better informed.<sup>79</sup> As a result, a project may be undertaken on inefficient terms. Moreover, suppose at a later stage, employees observe that risks are materializing vis-à-vis other employees and seek to quit the job, thereby saving their lives (or health).<sup>80</sup> Under normal contract rules (under a full property rule regime), they would have to compensate

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77. Cf. Rose-Ackerman, *supra* note 31, at 933 (“[I]nalienability rules can be second-best responses to various kinds of market failures . . .”).

78. See *supra* Section II.A.2.

79. Anne Marie Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL’Y REV. 87, 87, 89 (2011) (noting coal miners’ low wages and explaining that “[c]oal mine operators . . . are legally forced to compensate miners or their families for the miners’ loss, but for less than the cost of making the workplace safer”).

80. Elena Cottini et al., *Adverse Workplace Conditions, High-Involvement Work Practices and Labor Turnover: Evidence from Danish Linked Employer-Employee Data 23–25* (IZA Discussion Papers, Paper No. 4587, 2009), <https://www.econstor.eu/bitstream/10419/36283/1/616999682.pdf> (presenting

the employer either for expectation damages or at least for the training costs incurred. Yet, in many cases, they would find paying compensation highly burdensome and would unhappily opt to stay in the job, feeling exploited on the terms they initially agreed to.

Arguably, this problem—resulting from lack of information to the employees—could be resolved by imposing preemployment disclosure duties on the employer. Often, however, doing so would comprise an unsatisfactory solution: as legal writers have demonstrated, in most contexts, this sort of mandated disclosure comes via standardized forms, and those receiving the information either do not read the documents or do not properly understand the information provided to them about future contingencies.<sup>81</sup>

Consider now an LIR. Under an LIR, the employer knows that each employee is free to quit the job at any time with no penalties. Because the employer often invests in training the employees, if employees quit the employer expects to bear costs, such as a halted project with no trained workers available. This possibility motivates the employer to make substantial efforts to reduce the chances that employees quit. Consequently, before hiring an employee, the employer would probably want the employee to know exactly what risks the job entails, avoiding surprises stemming from the discovery of what otherwise would be new information. The employer with this outlook would not merely implement a standard disclosure document regarding the risks of the work; rather, she would invest considerable efforts to make the potential employee fully understand all risks involved before taking the job.<sup>82</sup> These efforts, in turn, would assure that employees take risky jobs only when it is in their best interests to do so, namely, when they capture a net gain from taking these workplace risks.<sup>83</sup> Furthermore, with employees possessing full information, the chances are high that if ultimately the project is implemented, it enhances rather than reduces social welfare. At the same time, if fully informed would-be employees are not willing to work under the best terms the employer is prepared to offer, perhaps the project is not socially beneficial after all.<sup>84</sup>

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empirical evidence indicating that workers in hazardous workplace conditions are more likely to quit their jobs).

81. See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 55–57 (2014) (arguing that disclosure in such cases is useless); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 709 (2011) (same).

82. Furthermore, the employer would tend to be more generous to the employee in the first place by offering a higher wage, thereby improving employee retention. This potential for higher wages has desirable distributional effects. See *infra* Section III.D.

83. We realize that even with full information poor employees might retain the job even if socially inefficient. If this risk is severe enough, an inalienability rule would be preferable to an LIR.

84. Cf. Jerry Kang & Benedikt Buchner, *Privacy in Atlantis*, 18 HARV. J.L. & TECH. 229, 255–56 & n.102 (2004) (arguing that the inalienability of the right to privacy in certain contexts could be justified by the right holder's lack of information and suggesting a possible solution, among others, in which the right holder would retain the right to revoke her consent at a later stage).

## B. PATERNALISM

## 1. Justifying Inalienability

Even with full information, transferring one's entitlements could adversely affect one's interests. In some of those cases—so the paternalistic argument goes—the law should intervene by prohibiting such transfers.<sup>85</sup> The main distinction between the paternalistic and the lack-of-information justifications is that the latter is based on the assumption that it is the lack of information that might cause errors, whereas the former is based on the premise that even with full information, individuals make errors and do not act in their best interest.

According to the paternalistic justification, people should not be allowed to sell their organs or subject themselves to high-risk occupations because they would often be severely affected by such transactions.<sup>86</sup> Similar reasoning can be used to justify women's inalienable rights to use their wombs for only their own fetuses (unless they volunteer to be surrogate mothers)<sup>87</sup> and prohibitions against prostitution.<sup>88</sup>

Protecting entitlements for social benefits with inalienability rules can also be justified by paternalism: poor beneficiaries might be tempted to prefer their short-term interests over their long-term interests by assigning their future rights to third parties for an immediate cash payment.<sup>89</sup> The state might seek to prevent such assignments by making those rights inalienable. Similar concerns could justify the limitations on tort victims' power to assign their rights to sue to third parties.<sup>90</sup>

In these settings, the paternalism argument is not that people are insufficiently informed. Rather, it is that people are agreeing to something now that they genuinely prefer in the short run (given the available alternatives), but which society views as against their long-run interests (which perhaps they voluntarily compromise because of short-term needs for money). The would-be seller is aware of

85. Calabresi & Melamed, *supra* note 1, at 1113–14; Radin, *supra* note 6, at 1898–99.

86. See Richard L. Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695, 718 (1982) (arguing that according to the paternalistic justification, people accept extraordinary risks “either because they have no choice (they can find no other jobs, they can afford no other goods, services, or places to live) or because they are striving for the rewards that capitalism confers on others without exacting a similar cost”); Bernard M. Dickens, *Morals and Legal Markets in Transplantable Organs*, 2 HEALTH L.J. 121, 125 (1994) (arguing that according to the paternalistic justification, “there shall be no coercion or over-inducement of people to sell their body materials”).

87. See Catherine London, Note, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 392 (2012) (“The risk of coercion and abuse inherent in [surrogacy] arrangements has resulted in paternalistic rulings and regulations restricting the practice of commercial surrogacy throughout the United States.” (footnote omitted)).

88. See Belinda Cooper, *Prostitution: A Feminist Analysis*, 11 WOMEN'S RTS. L. REP. 99, 105–06 (1989).

89. See, e.g., Dagan & Fisher, *supra* note 33, at 137 (stating that inalienability rules prohibit poor individuals from selling unused tax credits to wealthier individuals).

90. For a different justification for prohibiting assignment of tort claims, see *id.* at 117 (arguing that commodifying the right to sue, especially in the context of bodily injury, “could have the derivative reductive effect of commodifying the victim's bodily integrity”).

potential long-run negative consequences but chooses to unduly discount them in the face of short-run needs.<sup>91</sup>

## 2. The Mitigating Effect

An LIR would mitigate the paternalistic concern. By enabling a seller to change her mind, an LIR regime would allow for the passage of time and permit the seller to encounter directly (at least in some cases) some of those longer-run consequences before the exchange is complete. Hence, she could learn that her initial decision was not in her best interest even though she had previously concluded that, on balance, it was. It is not “new information” that brings this realization about, but her changed preferences with respect to the longer-run consequences.

To illustrate, changed preferences are a significant concern in the surrogate mother case. A woman who initially agreed to be a surrogate based on an informed decision to enter into a paid surrogacy contract might develop preferences during her pregnancy to keep the child, which the law would ordinarily prohibit.<sup>92</sup> Perhaps this paternalistic concern could be prevented via an inalienability rule, but then surrogates and would-be parents would not be able to make deals that both sides preferred. With an LIR, that concern would be dealt with head-on—the surrogate could change her mind, revoke the deal, and retain the baby with no penalties.<sup>93</sup>

Another rationale underlying the paternalistic argument is that the seller might have a new understanding about her best interests, which she did not have before. This understanding could be the result of the new experience she acquired, or perhaps just a realization of what she has done. There is evidence that people often make mistakes as to what is in their best interest because of lack of imagination: when a situation becomes more concrete and closer in time and place such that imagination plays a less central role, they are able to better assess what is good for them.<sup>94</sup>

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91. See Robert Young, *Autonomy and Paternalism*, 1981 BULL. AUSTRALIAN SOCIETY LEGAL PHIL. 32, 37, 42 (arguing that strong paternalism is preferred in cases in which the person is fully informed, yet he chooses his short-term needs over his long-term needs, such as when a person knows that “heroin addiction causes severe physical harm and likely death before thirty years of age, but still chooses to take the drug because he wants the pleasure of the moment more than anything else,” or when a person sells himself voluntarily into slavery because he prefers the short-term gain).

92. See Purvis, *supra* note 65, at 235–36 (arguing that due to the bonding between a woman and her fetus during pregnancy, not only are women harmed emotionally by separation from the child they gave birth to, but also they cannot predict that emotional harm).

93. Buyers might find ways to make revocation hard for sellers, for example, by tempting them with high rewards to stick to the deal. See *infra* Section III.C.2. This possibility is a virtue of an LIR, but we acknowledge that it might be a double-edged sword. Specifically, with more money to lose from revocation, many sellers would not revoke the deal even if going through with it did not serve their best interests.

94. See, e.g., Anne C. Dailey, *Imagination and Choice*, 35 L. & SOC. INQUIRY 175, 187, 201–02 (2010) (arguing that the low number of couples signing prenuptial agreements is the result of couples’ inability to imagine their relationship failing).

Relatedly, social psychologists have shown that when a large “psychological distance” in space, time, or culture exists between an actor and the subject matter she has to decide upon, the actor is likely to make a different decision from the one she would make with a smaller psychological distance.<sup>95</sup> Notably, a decision made from a further psychological distance would not necessarily be less accurate than one made from a closer psychological distance; sometimes the reverse is true. But experiments conducted by psychologists have revealed that actors making decisions from a further psychological distance consider less details or consequences than they do from a closer psychological distance.<sup>96</sup> In some (but not all) cases, this outcome might be a problem. When it is a problem, narrowing the psychological distance might be a solution; and when the psychological distance involves time, one way to narrow it is by allowing the actor to make the final decision in question as close as possible to the time when the decision is about to be irreversibly implemented. An LIR does exactly that: it allows the actor to make the final decision at the last minute. Therefore, in specific cases where there is a concern that actors would incorrectly assess their best interests at an early stage but would better assess them at a later stage, such actors might be allowed to revoke their prior decision, even at the last minute, rather than be prevented from making a decision at all.

What characterizes those specific cases in which actors’ failure to consider all the details can result in decisions likely to be especially harmful to them and which a lapse of time might cure? In all such cases, the process of implementing the transfer of the entitlement can create an awareness of its potentially harsh consequences. The sale of surrogate mother services and organs perhaps fall under this category. On the other hand, a seller might not be able to appreciate the personal costs of providing a service or body part until afterwards, in which case it would be too late to revoke the deal through an LIR. For example, a kidney seller might not be able to fully understand until after the kidney is gone how his or her body can be compromised or how community members might shame him or her.<sup>97</sup>

### C. DISTRIBUTIVE JUSTICE

#### 1. Justifying Inalienability

The distributive justice justification for inalienability stresses the concern that allowing the alienability of some entitlements would adversely affect the interests of disadvantaged groups in our society.<sup>98</sup> As opposed to the paternalistic

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95. See generally Nira Liberman & Yaacov Trope, *Traversing Psychological Distance*, 18 TRENDS COGNITIVE SCI. 364 (2014) (discussing psychological distance along the dimensions of time, space, social perspective, and hypothetical situations).

96. Yaacov Trope & Nira Liberman, *Temporal Construal and Time-Dependent Changes in Preference*, 79 J. PERSONALITY & SOC. PSYCHOL. 876, 887 (2000).

97. See Nancy Scheper-Hughes, *The Market for Human Organs Is Destroying Lives*, WASH. POST (Jan. 5, 2016), [https://www.washingtonpost.com/news/in-theory/wp/2016/01/05/the-market-for-human-organs-is-destroying-lives/?utm\\_term=.f9d05becc546](https://www.washingtonpost.com/news/in-theory/wp/2016/01/05/the-market-for-human-organs-is-destroying-lives/?utm_term=.f9d05becc546) [<https://perma.cc/J9QW-7GHB>].

98. See Calabresi & Melamed, *supra* note 1, at 1114–15.

justification, the distributive justice justification focuses on a group, rather than on the specific individual holding the entitlement.

The distributive justice justification is often raised by those who oppose the legalization of prostitution: they argue that selling sex for money degrades the women and men who enter the profession in general, and as a practical matter, absent a prohibition, many poor women and men would gravitate towards prostitution due to financial incentives.<sup>99</sup> Prohibiting prostitution—for example, by criminally prosecuting both buyers and pimps but not the prostitutes themselves (as in the Nordic model)<sup>100</sup>—is viewed as a way of drastically reducing the demand and forcing society to find other ways for those women who would otherwise have been prostitutes to obtain income.<sup>101</sup> This strategy is perhaps analogous to enforcing requirements that apartments be “habitable” and thereby removing from the market some units that are awful but better than living on the street. As a result, in the short run, some people may well become homeless until society is forced to respond by creating more habitable housing. In the transition, some people might be worse off: those who would elect to live in uninhabitable housing rather than on the street, or work as prostitutes to find some money to feed their children or support their drug habit. But these individualistic short-run preferences are overridden by a wider societal redistributive strategy.

The distributive justice justification can also be applied to selling organs, to subjecting oneself to high-risk occupations, and to performing surrogacy.<sup>102</sup> In all those cases, it is not only the interests of the specific entitlement holders that are at stake, but rather the concern that given the alienability of those entitlements, the sellers would typically be the poor, the buyers the rich. This is problematic from a distributive justice perspective.<sup>103</sup> A similar concern applies to civic duties: for example, if a duty is imposed on citizens to serve in the military and risk their lives for their country, we do not want only (or mostly) poor people to shoulder that burden.<sup>104</sup>

99. See Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 273–76 (2011).

100. See Jorn Johannes Marinus van Rij, *Human Trafficking and Prostitution Policy - A European Issue?*, 2014 PÉCS J. INT’L & EUR. L. 75, 75.

101. See Ane Mathieson et al., *Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. FOR SOC. JUST. 367, 400–01 (2015).

102. See Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 544 (2007) (“[E]conomic necessity could force some poor women to enter surrogacy agreements which they otherwise never would have entered.”); Joshua Weisman, *Organs as Assets*, 27 ISR. L. REV. 610, 616 (1993) (“[A] situation in which the body of a poor person will be used as a stockpile of spare parts for the rich must be prevented, even if the poor person has given his consent.”).

103. Although sellers in surrogacy cases are typically poor, buyers are not necessarily rich. A desire for a child, and the willingness to pay to have one, is not limited to the rich.

104. See Hank Greely, *The Equality of Allocation by Lot*, 12 HARV. C.R.-C.L. L. REV. 113, 115 (1977) (discussing necessity of considering “overarching objectives of equality and fairness” to promote equal distribution of burdens among citizens in draft lotteries).



## 2. The Mitigating Effect

LIRs could play an important role in curing distributive justice concerns. Consider surrogate mothers, organ sellers, and high-risk-to-life cases. In these cases, an LIR can mitigate one aspect of the distributive justice concern existing under a property rule. In some circumstances, sellers could often make better deals under an LIR than under a property rule. As discussed earlier, LIRs provide buyers with incentives to offer sellers more generous payments for their entitlements, reducing the chances that the seller would change her mind later in the process, revoke the sale, and leave the buyers with uncompensated losses.<sup>105</sup>

This argument is counterintuitive. Indeed, at first glance one could think the effect on the payment offered to the seller should be exactly the opposite: with an LIR the buyer receives less than what she receives under a property rule and therefore would be willing to pay less in return. Though this could be right in some cases, it would be wrong in most cases when distributive justice concern is a substantial reason for disallowing a property rule. Indeed, in these latter cases, there is a risk that with a property rule, buyers would be in a position to exploit sellers and extract most of the contractual surplus from them. For such cases, an LIR would certainly be an improvement: buyers would offer sellers higher payments than under a property rule to reduce the chances that sellers would revoke the deal at a later stage.

Thus, LIRs could have progressive effects: when sellers are disadvantaged groups in society and susceptible to exploitation by buyers, they would be better off with an LIR rather than a property rule. Indeed, if the risk of anaemic prices for certain entitlements were the only concern, even under a property rule, legislatures could have intervened in the market and set minimum prices (or terms). Discussing this possibility is beyond the scope of this Article; for our purposes, it is suffice to conclude that in some cases an LIR could produce desirable distributive consequences.

Nonetheless, we concede that in some settings the leverage of being able to change your mind will likely have little effect. If a group of women have been gathered together in multi-unit buildings, say in India, to serve as surrogate mothers for well-to-do people in other countries, the buyers of the surrogate services will probably realize that these women are extremely unlikely to change their minds and keep the children. The buyers will understand that surrogates are in it for the money and are probably being exploited financially by the operators of the business. If preventing women from choosing to go into this sort of business on

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105. See *supra* Section II.B. Interestingly, instead of offering higher prices at the time of contracting, buyers might offer low prices and later renegotiate the price should the sellers want to revoke the deal. Although such a strategy would also end up with relatively high payments to sellers in total, it would affect sellers unequally; it also advantages more sophisticated sellers who are better negotiators. We envision that most buyers would prefer to pay higher prices up front, knowing that it would be hard later on to distinguish between sellers who really regret the deal and sellers who just pretend to regret it in the hope of attaining a higher payment. This does not mean that some sellers would not renegotiate even a high initial price, but such renegotiation would be less common than with low prices.

these terms is the distributive justice goal, then an LIR will not suffice, and an effective inalienability rule may be required (at least until women who are truly happy to carry babies for others are substantially better treated).

Finally, with respect to prostitution, LIRs are quite meaningless. One who regrets selling sex cannot change her mind after the act. Before the act, the prostitute can in principle walk away because typically no money has changed hands yet and the promise of sex would not be legally enforced. The important changing of one's mind that is at stake in this situation concerns the prostitute who wants to leave the business. Legally, this choice is already an option currently available to her: her pimp or brothel operator cannot enforce what would amount to a sex-slave contract. Practically, however, physical threats or dire financial circumstances would likely hold her hostage.<sup>106</sup> Hence, an LIR is unlikely to affect the distributive justice concern in this case.

#### D. PERSONHOOD

##### 1. Justifying Inalienability

A common justification for inalienability rules is the negative effects property rules could have on people's personalities. This justification applies to those entitlements which are central to people's identity, dignity, and autonomy. Selling them in a market transaction degrades their holders as human beings and therefore should be prohibited.

Margaret Radin famously underscored the personhood justification. According to Radin, there are three aspects of personhood which should be protected: freedom, identity, and contextuality. On Radin's understanding,

The *freedom* aspect of personhood focuses on will, or the power to choose for oneself. In order to be autonomous individuals, we must at least be able to act for ourselves through free will in relation to the environment of things and other people. The *identity* aspect of personhood focuses on the integrity and continuity of the self required for individuation. In order to have a unique individual identity, we must have selves that are integrated and continuous over time. The *contextuality* aspect of personhood focuses on the necessity of self-constitution in relation to the environment of things and other people. In order to be differentiated human persons, unique individuals, we must have relationships with the social and natural world.

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106. See Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 25–26 (1993).

. . . Contextuality means that physical and social contexts are integral to personal individuation, to self-development.<sup>107</sup>

Alienability—or, more broadly, commodification—of entitlements that are integral to people’s identity could be harmful to personhood; if so, it should be avoided. Making those entitlements “monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human.”<sup>108</sup> Therefore, “one’s . . . religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes”—which are “integral to the self”—should not be subject to market alienability.<sup>109</sup> Or, more broadly, personhood entitlements should not be monetized.<sup>110</sup>

Inalienability, according to Radin, could be justified as protecting personhood in three different ways: by being prophylactic, by assimilating it to prohibition, and by avoiding the domino effect.<sup>111</sup> The prophylactic justification focuses on the freedom aspect of personhood.<sup>112</sup> It makes some entitlements that are integral to personhood inalienable, because otherwise, in certain (even if not all) cases, their holders might be coerced to sell them. Because it is often impossible to scrutinize such transactions case-by-case for voluntariness, it might be a good strategy to ban them altogether “because the risk of harm to personhood in the coerced transactions we might mistakenly see as voluntary is so great that we would rather risk constraining the exercise of choice by those (if any) who really wish to [sell them].”<sup>113</sup> Radin gives the ban on self-enslavement as an illustration of a rule that can be justified as being prophylactic.<sup>114</sup>

The second justification involves a prohibition against commodification of personal entitlements.<sup>115</sup> Such commodification is, according to this justification, inherently bad because it alienates and degrades human beings, or converts those entitlements into something different in nature from what they would be with

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107. Radin, *supra* note 6, at 1904–05 (emphasis added) (footnote omitted). A close relationship exists between theories of personhood and theories of self-determination and autonomy. For a detailed discussion of self-determination, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369 (1986), and see also Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 *BERKELEY TECH. L.J.* 229, 251–52 (2014) (discussing self-determination in the context of copyright law); Hanoch Dagan, *Markets for Self-Authorship*, 27 *CORNELL J.L. & PUB. POL’Y* 577, 591–92 (2018) (discussing the right of contractual parties to regret as essential to the enhancement of their autonomy); Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 *COLUM. L. REV.* 1395, 1406 (2016) (discussing the centrality of both self-determination and autonomy in private law).

108. Radin, *supra* note 6, at 1906.

109. *Id.*

110. *Id.*

111. *Id.* at 1909–14.

112. *Id.* at 1910–11.

113. *Id.* at 1910.

114. *Id.*

115. *Id.* at 1912.

noncommodification.<sup>116</sup> Thus, love, friendship, and sexuality become different if commodified, and commodifying them might be considered morally wrong.<sup>117</sup> Note that inalienability under this second justification has nothing to do with coercion, which is central to the first justification.

The third justification for inalienability is its avoidance of the domino effect.<sup>118</sup> The domino effect theory maintains that noncommodified entitlements relating to personhood are morally preferable to their commodified version and that the two versions cannot coexist.<sup>119</sup> The underlying assumption of this theory is that the commodified version dominates the noncommodified version, and once the former exists the latter disappears.<sup>120</sup> To illustrate, the domino effect theory maintains that because it is morally required that noncommodified sexuality be possible, market-inalienability of sexuality should prevail. Otherwise, every sexual relationship would be commodified, and its noncommodified version would not exist.

Many cases of inalienability can be explained as being motivated by one or more aspects of personhood. Indeed, the debates surrounding surrogate mothers<sup>121</sup> and the legality of prostitution<sup>122</sup> often allude to personhood concerns. So do the arguments against selling organs, babies,<sup>123</sup> and cultural property.<sup>124</sup> Moreover, at least some of the limitations on citizens' power to waive constitutional rights can be explained as protecting personhood.<sup>125</sup>

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116. See *id.* For the argument that valuation of certain goods that are not commodifiable should not be conducted through market mechanisms, but instead by other criteria applied by the state that are also sensitive to the intrinsic values of such goods, see ELIZABETH ANDERSON, *VALUES IN ETHICS AND ECONOMICS* 190–216 (1993).

117. See Radin, *supra* note 6, at 1912.

118. *Id.* at 1912–14 (“We can now see how the prohibition and domino theories are connected. The prohibition theory focuses on the importance of excluding from social life commodified versions of certain ‘goods’ — such as love, friendship, and sexuality — whereas the domino theory focuses on the importance for social life of maintaining the noncommodified versions. The prohibition theory stresses the wrongness of commodification — its alienation and degradation of the person — and the domino theory stresses the rightness of noncommodification in creating the social context for the proper expression and fostering of personhood. If one explicitly adopts both prongs of this commitment to personhood, the prohibition and domino theories merge.”).

119. *Id.* at 1912–13.

120. *Id.*

121. See *id.* at 1928–34.

122. See *id.* at 1934–36.

123. *Id.* at 1925–28.

124. See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 570 (1995) (discussing the effect that cultural property has on one's identity and implanting Radin's theory on this effect); see also *infra* notes 171–76 and accompanying text.

125. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1484–85 (1989) (presenting the personhood argument as a justification for inalienability of constitutional rights). For a discussion about paternalism, efficiency, distribution, and personhood theories in the context of inalienability of constitutional rights, see *id.* at 1479–89.

## 2. The Mitigating Effect

As we have explained above, there are three aspects of personhood, according to Radin, which should be protected: freedom, identity, and contextuality.<sup>126</sup>

We begin with freedom. Here, the argument is that the risk of coercion is the main concern in protecting personhood; hence, an inalienability rule, as a prophylactic rule, is the solution.<sup>127</sup> Could an LIR comprise an alternative solution, at least for some types of entitlements relating to personhood? Perhaps so. Because an LIR widens the range of time within which the seller makes up her mind regarding whether to depart of the entitlement in question, her final decision could be more deliberate and informed<sup>128</sup> than under a property rule. Therefore, if she eventually decides to depart of her entitlement under an LIR, the chances that her decision is not coerced are substantially increased. Put differently, Radin's objection to ordinary alienability is much stronger than it would be to LIRs. True, inalienability is even more effective than an LIR in terms of reducing the chances of coercion, but it also imposes higher costs in terms of increasing the chances of precluding noncoerced transactions.

The two other aspects of personhood—identity and contextuality—are more challenging to our theory of LIRs. Alienability and commodification of entitlements which are integral to people's identity and to their capability to establish social relationships (that is, contextuality), according to Radin, are inherently bad because they degrade human beings and should be avoided.<sup>129</sup>

If selling personhood-related entitlements is considered to be bad in itself, regardless of whether the seller has a free choice, inalienability assimilates a prohibition against such sales because they are morally undesirable.<sup>130</sup> Under this theory, an LIR does not seem to be an acceptable solution because it allows people to sell such entitlements exactly as under a property rule.

But under closer examination, it is important to appreciate that an LIR might attenuate the moral concern of selling personhood-related entitlements, even if selling such entitlements in a market transaction is considered bad in itself. Under an LIR, at least until a certain point, the seller can unilaterally revoke the deal with no penalties. Until that point, she has no obligations—only the buyer does. Such asymmetry in the parties' obligations makes transactions under an LIR different from the typical market transactions under a property rule. Transactions guided by an LIR might be less harmful to personhood because of the seller's unilateral power to revoke the deal. Thus, if a surrogate mother has the right to change her mind (say, at any time before delivering the baby to the biological parents) and revoke the deal, she is perhaps less degraded—or even not degraded at all—compared to a situation in which she has no such right. Notably, however,

126. See *supra* note 107 and accompanying text.

127. See *supra* notes 113–14 and accompanying text.

128. She also receives more information from the buyer than she would under a property rule. See *supra* Section II.B.

129. See *supra* note 109 and accompanying text.

130. See *supra* note 114 and accompanying text.

this reasoning assumes that the degradation stems from having to surrender a child that she was carrying; if degradation is inherent in the economic coercion of having to enter the rent-a-womb business in the first place, then having a right to revoke the deal during the pregnancy probably does little to mitigate it.

So far we have discussed two possible justifications to the inalienability of personhood-related entitlements—being prophylactic and assimilating it to a prohibition—and asked whether an LIR could mitigate the concerns underlying these justifications. A third justification—the domino effect—is that the commodification of personhood-related entitlements would exclude the noncommodified version of those entitlements.<sup>131</sup> The existences of this latter version is morally significant, and therefore commodification is morally wrong. In the context under discussion, the question is whether an LIR might have less harmful effects on the noncommodified version of the entitlements sold in market transactions. Because the answer depends on circumstance, we cannot provide a general answer to this question. Lawmakers adopting an LIR should therefore be aware of the risk of the domino effect and make sure than an LIR would not do more harm than good.<sup>132</sup>

#### E. NEGATIVE EXTERNALITIES

##### 1. Justifying Inalienability

Allowing entitlement holders to transfer their entitlement could have adverse effects on third parties and, if so, should perhaps be prohibited or limited.<sup>133</sup> Thus, it has been argued that tort claims should not be alienable, because assigning them to third parties would reduce deterrence of wrongdoers.<sup>134</sup> Similarly, a possible ban on transfer of rights to pollute could be explained by the concern that the transfer might externalize costs to third parties.<sup>135</sup> The prohibition on selling the right to vote is commonly justified by such sale's adverse effects on democracy, which serves the public interest.<sup>136</sup> The inalienability of constitutional

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131. See *supra* notes 118–20 and accompanying text.

132. What Radin calls the “domino” effect is what is often called the “crowding out” effect. For an extensive literature in social psychology that considers the crowding out of intrinsic motivations, see Edward L. Deci et al., *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivations*, 125 *PSYCHOL. BULL.* 627 (1999).

133. See Epstein, *supra* note 30, at 970, 973–78 (arguing that externalities on third parties may justify limiting the right of alienation); Rose-Ackerman, *supra* note 31, at 938 (arguing that externalities on third parties provide the most commonly recognized rationale for inalienability rules).

134. We are not persuaded that this argument is factually correct, but this question lies beyond the scope of our discussion. See Abramowicz, *supra* note 36, at 727–30 (criticizing the general argument whereby purchasers of legal claims may create negative externalities and arguing that from an efficiency perspective, there should not be a total prohibition on claim sales).

135. See Calabresi & Melamed, *supra* note 1, at 1111 (arguing that negative externalities may justify an inalienability regime). *But see* Abramowicz, *supra* note 36, at 727–28 (criticizing Calabresi and Melamed's argument).

136. See Rose-Ackerman, *supra* note 31, at 963 (“Vote selling [in political life] is widely recognized to be inconsistent with egalitarian, democratic principles because it biases political decisions in favor of the wealthy.” (footnote omitted)).

rights can also be explained by the effects of selling such rights on third parties.<sup>137</sup> Thus, once it is accepted that the right to free speech and the right to exercise one's religion serve the public interest besides the rights holder's private interests, waiving those rights might adversely affect societal interests sufficiently to make it desirable to preclude such waivers.

Finally, in many jurisdictions, citizens and governments are not allowed to trade with cultural property in general, or with foreigners or foreign governments, in particular.<sup>138</sup> One justification for this rule is the negative externalities concern: future (and also current) citizens would be adversely affected by transfer of cultural property to foreign countries.<sup>139</sup> Unfortunately, present governments are likely to ignore future generations' interests, and citizens who presently own cultural property are likely to ignore all others' interests.<sup>140</sup> Therefore, a ban on any transfer of cultural property to foreigners or to foreign countries might well be a reasonable solution to the negative externalities concern.<sup>141</sup>

## 2. The Mitigating Effect

On the surface, LIRs seems useless in mitigating the negative externalities concern: the entitlement holder who sold or waived her rights because she did not care much about costs to third parties is not expected to care more about those costs at a later stage and revoke the sale or the waiver. Nevertheless, an LIR, at least compared to a property rule, could mitigate the negative externalities concern. Specifically, it provides opportunities to third parties who might be adversely affected by the deal to intervene and increase the chances that the deal would ultimately be revoked.

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137. See Sullivan, *supra* note 125, at 1481–83 (discussing scholarly writings that defend inalienability of constitutional rights as a means of correcting market failures, such as externalities).

138. See *infra* Part V.

139. See *supra* Section III.E.

140. For discussion of the disregard of current governments of future generations' interests, see Douglas A. Kysar, *Discounting . . . on Stilts*, 74 U. CHI. L. REV. 119, 141 (2007) (arguing that, because future citizens cannot vote for current elected officials, democratic governments give much greater weight to the interests of current citizens); see also Eric A. Posner, *Agencies Should Ignore Distant-Future Generations*, 74 U. CHI. L. REV. 139, 140 (2007) (explaining why officials ignore future generations).

141. Fennell's arguments, see *supra* note 6, or at least some of them, could be characterized broadly as relating to concerns about negative externalities. Thus, banning or restricting transfer of entitlements to prevent a potential seller from hold out vis-à-vis a future buyer, addresses a specific negative externality. Another negative-externality concern with property rules that inalienability rules could solve is the problem that markets in some types of goods might encourage criminality and socially reprehensible ancillary behaviors. For example, a ban on selling organs has been justified as avoiding criminal behavior of harvesting organs for sale. See Dean Lueck & Thomas J. Miceli, *Property Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 183, 246 (A. Mitchell Polinsky & Steven Shavell eds., 2007). Similarly, a ban or restrictions on selling cultural property might reduce the incentives of potential offenders to steal such property or acquire it in offensive manners. See LYNDEL V. PROTT & PATRICK J. O'KEEFE, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY, at v–vi (1988) (“Export control is intended by many States to impede the flow of stolen goods as well as those which have been clandestinely excavated or which are required for the building up of a national collection.”).

Consider the case of selling cultural property by a poor country to a rich country, because the current government of the poor country does not care much about future citizens who would bear emotional harm caused by the sale. Here, an LIR could be a practical way to mitigate the negative externalities concern: by allowing future governments of the poor country to revoke the deal and regain the property, future generations of the poor country would be better protected than under a property rule. Once the poor country becomes prosperous enough, regaining the cultural property might be a viable option that the subsequent government could pursue. In such cases, an LIR converts what otherwise would be a sale into a loan of these objects. To be sure, a complete ban on selling cultural property might sometimes be more effective in protecting third parties than an LIR, but it also entails costs.<sup>142</sup> As in other cases, an LIR might therefore be an adequate compromise between a complete ban on such sales or an unlimited permission to execute them.<sup>143</sup>

#### F. EXTERNAL MORAL COSTS

##### 1. Justifying Inalienability

In a recent book, Guido Calabresi coined the term “external moral costs” to refer to the emotional harm third parties suffer because merit goods are traded in the market.<sup>144</sup> Calabresi contends that this harm could constitute a reason for society to ban trade in merit goods. Calabresi divides merit goods into two categories.<sup>145</sup> The first refers to goods that many people do not want to be priced in any way, either through the market (commodification) or through collective commands (“commandification”)<sup>146</sup>—in other words, goods that many people do not want to be translated into monetary terms. Second are goods that many people do not want to be allocated through the market or, more generally, that people resist their allocation to be determined by the prevailing wealth distribution in society.<sup>147</sup>

Consider the selling of organs. The commodification aspect might trouble some people; trading one’s organs for money would commodify them, which, in itself, could degrade human beings.<sup>148</sup> Others might be concerned also, or only, on the allocation front: if organs can be legally traded on the market, poor people will typically be the sellers and rich ones the buyers.

Seemingly, overlap exists between this concept of external moral costs and the personhood and the distributive justice concerns discussed above. But there is a difference between them: the personhood and the distributive justice concerns

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142. See *infra* Part V.

143. See *id.*

144. GUIDO CALABRESI, *THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION* 26–27 (2016).

145. *Id.* at 29.

146. *Id.* at 31.

147. *Id.* at 26–29.

148. The same concern might arise if legislatures were to ascribe monetary value to kidneys (“commandification” in Calabresi’s terms).



focus on the parties involved in, or directly affected by, the trade in merit goods; the external moral costs concern focuses on the emotional harm suffered by all (or many) members of our society because they are sensitive to the personhood and the distributive justice concerns, even if not directly affected by them.<sup>149</sup>

## 2. The Mitigating Effect

Because external moral costs are typically derived from distributive-justice and personhood concerns, mitigating the latter two also mitigates the former. Because an LIR could affect, at least to a certain degree and in some cases,<sup>150</sup> the distributive justice and the personhood concerns, it could also affect the external moral costs concern.

### G. SUMMARY

In this Part of the article, we showed how several effects triggered by an LIR mitigate the main objections to the application of property rules to some types of entitlements. Although an inalienability rule responds fully to those objections by barring any transactions in those entitlements, it often sacrifices the holder's autonomy and social welfare. An LIR comprises the midway point between property and inalienability rules; once appreciated, it may often be the preferable approach. Below we summarize the effects of an LIR on the objections to a property rule.

First, an LIR allows the seller to revoke the deal based on new circumstances as they emerge. This effect at least weakens the paternalism, distributive justice, personhood, and external moral costs objections.

Second, an LIR allows the seller to revoke the deal based on new information she received after concluding it. This effect weakens the lack of information, personhood, and external moral costs objections.

Third, an LIR allows the seller to consider a new understanding of the deal in deciding whether to perform or revoke it. Fourth, an LIR allows the seller to consider her changed preferences. Both the third and fourth effects attenuate the paternalism, distributive justice, personhood, and external moral costs objections.

Fifth, an LIR allows for third parties, adversely affected by the deal, to intervene. This effect mitigates, in some cases, the negative externalities objection.

Finally, a sixth effect of an LIR involves providing incentives to the buyer to (1) convey information to the seller at the time of contracting, and (2) offer her a generous deal to reduce the chances that she would revoke the deal and leave the seller with uncompensated losses. This effect attenuates the lack of information, distributive justice, and external moral costs objections.

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149. Cf. Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809 (2017) (arguing that regulators should take into account peoples' moral commitments and views in their cost-benefit analyses).

150. See *supra* Sections III.C.2, III.D.2.

#### IV. OBJECTIONS AND REFINEMENTS

In this Part of the article, we discuss a few potential objections to our proposal. First, sometimes the revocation period offered by LIRs must be short, and, if so, most of the advantages created by LIRs would be minimal. Second, LIRs leave buyers underprotected, so that they might be worse off compared to their position under both property and inalienability rules. Third, under an LIR, sellers are likely to behave strategically, making LIRs especially unattractive for buyers. Some of these objections are serious and, as such, deserve serious consideration. As we show below, although none of them is fatal to our proposal, some demand its refinement. In particular, we argue that in some contexts, softer variations of an LIR would function better than a full-blown LIR.

##### A. INFEASIBILITY WHEN THE REVOCATION PERIOD IS SHORT

The advantages of an LIR all emanate from the time period during which the transferor has a right to undo the deal. During that time, the seller could acquire information and experience, and reconsider whether she wants to revoke the transaction. But what if the period for revocation is short, either for practical considerations that prohibit a longer one or because the party acquiring the entitlement insists on a short revocation period (assuming he can do so)? With a short—sometimes very short—period of time for revocation, all the advantages of an LIR over a property rule evaporate.

This objection to LIRs has two main responses. First, in most of the cases discussed in the previous parts of this Article, the time for revocation would typically be reasonably long—take the surrogate mother or the cultural property cases as examples.<sup>151</sup> Second, in cases where this time is likely to be short, the law should mandate a minimum amount of time that should elapse between the time at which the deal is made and the time when the right of revocation could reasonably be invoked. For example, in the case of selling organs, the parties to the deal should not be allowed to agree on an immediate or almost immediate performance. Instead, the law should oblige the parties (unless implantation is urgent) to wait for at least a few weeks after contracting, before the organ is irreversibly taken from the seller.

Typically, the amount of time a would-be transferor reasonably needs to reconsider whether or not to go ahead with the agreement will vary depending on what is at stake. Hence, it probably suffices if a buyer of magazines sold door-to-door has only a few days to decide to cancel the order, whereas a poor nation that permits its cultural property to be transferred elsewhere may have to be entitled to an indefinite period to retrieve it back.

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151. In the surrogate mother example, the time for revocation may be when she gives birth to the baby, or when she delivers the baby to the biological parents. See *supra* notes 16–17 and accompanying text. As to cultural property, see *infra* Part V.

## B. PROTECTING BUYERS

Another objection focuses on the buyers' interests. Some buyers—according to this objection—might be worse off with an LIR than with an inalienability rule. Consider the case of a surrogate mother: if under an LIR regime the surrogate mother actually changes her mind, the biological parents are left worse off than they would be had there been a prohibition against surrogacy agreements in the first place. At a minimum, because of the revocation of the deal, they would suffer emotional harm.<sup>152</sup> But they might also bear reliance losses, such as expending money on medical care for the surrogate mother or on preparation for the birth of the baby.<sup>153</sup> Under an LIR, those losses would not be compensated for.<sup>154</sup>

The answer to this objection is that under an LIR, buyers have a choice of whether to take the risk of revocation in exchange for the opportunity to acquire a certain entitlement; under an inalienability rule they have no such choice. Therefore, from an *ex ante* perspective, they are typically better off under an LIR: more choices are better than fewer choices.

Critics might counter that our answer disregards that buyers—not just sellers—are prone to make mistakes due to lack of information.<sup>155</sup> Thus, in the surrogacy case, the concern is that the biological parents, who strive for a child, might underestimate both the risk that the surrogate mother could change her mind and the substantial emotional harm that they would bear in such a case.

One response to this counter argument is that in many of the cases discussed in the previous parts of this Article, the buyer would not suffer significant harm if the seller revokes her consent. Thus, for example, a buyer of cultural property<sup>156</sup>

152. See Kelly A. Anderson, Note, *Certainty in an Uncertain World: The Ethics of Drafting Surrogacy Contracts*, 21 GEO. J. LEGAL ETHICS 615, 628 (2008) (“[S]ome will point out the fragile emotional state of many infertile couples, which leads to the conclusion that intended parents may be subject to exploitation by the surrogate.” (footnote omitted)); Bette J. Dodd, Note, *The Surrogate Mother Contract in Indiana*, 15 IND. L. REV. 807, 822 (1982) (discussing the emotional distress that the buyers may suffer if the surrogate breaches the contract).

153. Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. CONTEMP. HEALTH L. & POL’Y 279, 288–89 (2011) (“A court could order a breaching surrogate to reimburse the intended parent(s) for various expenses, such as the cost of maternity clothing and medical expenses. Likewise, the intended parent(s) could request reliance damages from the surrogate resulting from expenses incurred in reasonable reliance on her promise to relinquish the child, such as the cost of constructing a nursery or the purchase of baby clothes.”). For information regarding damages based on reliance interest, see generally RESTATEMENT (SECOND) OF CONTRACTS § 349 (AM. LAW INST. 1981).

154. So far we have discussed an LIR under which revocation entails no liability on the part of the seller. However, the remedies available to the buyer are a variable that may change due to concerns relating to the interests of both the seller and the buyer. See *infra* Section IV.D.3.

155. Theoretically, other concerns that apply to sellers might also apply to buyers, such as paternalism, distributive justice, and personhood. But typically, those latter concerns are much more relevant to sellers than to buyers because in almost all the cases where inalienability is a plausible option, the sellers’ (rather than the buyers’) separation from their entitlements raise special concerns.

156. See *infra* Part V.

would typically not suffer significant harm if the deal is revoked.<sup>157</sup> Even a buyer of a human organ would not necessarily suffer significant harm if the deal is revoked, as long as she can still enter into a substitute contract and obtain the organ she needs.

A second response is that in most of the cases discussed in this Article, the risk of the buyer's mistakes—as opposed to the seller's mistakes—is not much different from the risk of contractual parties' mistakes in other contexts. Therefore, as in other contexts, buyers' potential mistakes should not be a reason to prohibit transactions or parties' choices altogether. This is not to say that buyers' mistakes should not comprise a consideration in tailoring the LIR for some types of cases. In particular, when buyers are likely to bear significant losses if the seller revokes the deal—such as in the surrogacy example—some liability of the seller if revocation takes place beyond a certain point of time might be an adequate compromise between the competing interests of the seller and the buyer.<sup>158</sup>

### C. STRATEGIC SELLERS

In the previous sections, we discussed potential risks to buyers implicitly assuming that sellers do not behave strategically. Here, we introduce a third objection to LIRs, which focuses on the risk of strategic behaviors of sellers. According to this objection, sellers might enter into agreements to sell their entitlements at a certain price, with the intention to renegotiate the price in a later stage, when the buyer becomes more vulnerable—namely, when revocation would leave her with significant uncompensated losses.

Take again the surrogacy case as an example: a strategic surrogate mother might enter into an agreement with the biological parents, and just before delivering the baby inform the biological parents that she will revoke the deal unless the price is doubled. Note that this risk of strategic behavior—or extortion—cannot be avoided, as long as the right to revoke the deal is unlimited and can be implemented for any reason.<sup>159</sup>

The risk of strategic behavior by sellers is substantially different from the risk of lack of information to buyers (even if they sometimes coexist). Even informed buyers cannot avoid the former risk. A fully informed buyer could avoid the deal or enter it cognizant of the risk of the seller's strategic behavior. But if this risk is high, almost no one would purchase the entitlement, rendering the LIR futile.

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157. However, this is not always the case. Imagine that a museum in the buying country invested in an expensive viewer base for the cultural property; revocation by the selling country would leave the museum with uncompensated losses.

158. For a discussion about the optimal time for the right to revoke the deal under an LIR, see *infra* Section IV.D.1.

159. For limiting this right, see *infra* Sections IV.D.2–3 and see also *infra* notes 161–64 and accompanying text. *But see* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2316–18 (1995) (arguing that the risk of strategic behavior on the part of the surrogate mother is much smaller than in regular market transactions, because all parties care about the newborn baby and are especially careful in selecting the other party to the surrogacy contract).

There could be several responses to this objection to LIRs. First, as noted above, in many of the cases discussed in this Article, the buyer would not bear significant losses upon revocation. Such an invulnerable buyer is immune to extortion and other strategic behaviors. Second, even if the buyer is vulnerable at a certain stage, the seller is also under the risk of losing the deal if the renegotiation fails. Sometimes losing the deal is much more than forgoing potential profits. In the surrogacy case, a surrogate mother who went too far with her effort to extort the biological parents might end up with no payments and an unwanted child. Because the buyer is aware of this potential outcome, the parties' bargaining power is not—as the strategic behavior objection assumes—necessarily asymmetrical.

Third, even if asymmetry exists in the parties' bargaining power—such that, at a certain point, the buyer is more vulnerable than the seller—the mere fact that the buyer would have to pay more than the sum initially agreed upon is not necessarily bad. Remember the distributive justice objection to some inalienability rules, and the progressive effects of LIRs as a justification for adopting them.<sup>160</sup> The ability of the seller to renegotiate the deal and extract a higher price might sometimes reinforce the desirable distributional effects of LIRs. Thus, a renegotiation might be a tool to correct an injustice done to the seller when the original price for the entitlement has been set too low.<sup>161</sup>

But in certain cases, strategic behavior might be a genuine risk. Could this risk be mitigated? One solution is to limit the right to revoke the deal in time and/or circumstances. We will elaborate on those possibilities in the next section, although we note that to avoid strategic behavior, the circumstances should be objective and not just in the seller's mind. Thus, a new understanding or changed preferences could not be effective criteria for applying the right of revocation because it is hard to distinguish between sellers motivated by new understanding or changed preferences from sellers looking to take advantage of buyers' vulnerability and extort them.

Another solution is to impose some liability on the seller if she revokes the deal beyond a certain point of time,<sup>162</sup> thereby making her bargaining power in renegotiating the price weaker than under an unlimited right of revocation.

Lastly, an immutable rule could prohibit renegotiating the price, making any change to the price unenforceable.<sup>163</sup> Because not all renegotiations are strategic or opportunistic, this solution might be too drastic. For example, there might be

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160. See *supra* Section III.C.2.

161. Although characterizing sellers as poor and buyers as rich does not always reflect reality. See *supra* note 103.

162. For a discussion about the optimal time for the right to revoke the deal under an LIR, see *infra* Section IV.D.1 and see also *supra* note 158 and accompanying text.

163. Cf. Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203 (1997). Jolls argues that “[c]ontrary to traditional wisdom, the parties to a contract may be better off if the law enables them to tie their hands, or ties their hands for them, in a way that prevents them from taking advantage of certain ex post profitable modification opportunities.” *Id.* at 205.

legitimate reasons for the seller to insist on a higher price: changed circumstances, new information, new understanding, or changed preferences. A less drastic solution would be to allow renegotiation only for certain verified reasons—such as significant changed circumstances—but not for other reasons, such as changed preferences.<sup>164</sup>

#### D. REFINEMENTS

So far we have focused on the basic LIRs, according to which the party transferring the entitlement could revoke the deal at any time for any reason without penalty. In this section, we first discuss the optimal length of time for revoking the deal under an LIR. We then discuss two variances of LIRs: first, an LIR under which the right to revoke the deal is conditioned upon changed circumstances or new information; and second, an LIR under which revocation entails the seller's liability.

##### 1. Optimal Length of Time

What is the optimal time for the right to revoke the deal under an LIR? As we have indicated in the previous sections, revocation under an LIR is not cost-free because it might adversely affect buyers and even expose them to strategic behaviors by sellers. This risk increases as the time to revoke the deal becomes longer. However, reducing this window of opportunity, while minimizing those costs, would bring the LIR too close to a property rule. To illustrate, if one who agrees to transfer her organs can revoke the deal within two days after contracting, she would not be in a much different situation than the one she would have been in if she had no right of revocation at all.

Indeed, there is a wide range of potential LIRs varying on the time dimension. When buyers face more severe risks of losses if the deal is revoked, the time of revocation should be shorter. But the more severe the concerns regarding a property rule are, the longer the time of revocation should be. Sometimes, any LIR located on the time axis between minimal time of revocation and infinite time of revocation would be worse than no LIR at all, and then the legal system should make the choice between adopting a property or inalienability rule. To illustrate, if the potential harm to ill-informed buyers of surrogacy services is too high with a right of revocation that expands until the third month of pregnancy or later, and if to mitigate the concerns emanating from surrogacy agreements under a property rule the right of revocation should expand until the birth of the child, an LIR is not a viable option.

However, as we will show below, there could be other methods to relax the adverse effects of LIRs on buyers, and eventually, those other methods would affect the optimal time of revocation. Thus, even if a “pure” LIR—that is, an LIR with an unlimited right to revoke the deal with no penalties—would fail, a softer variance of an LIR could still work well.

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164. The question whether the doctrine of duress would apply to some modifications to the original contracts, making them unenforceable, is beyond the scope of this Article.

## 2. LIR Conditioned upon Changed Circumstances or New Information

One of the effects of allowing revocation after contracting is that one party is able to reconsider her decision to transfer the entitlement, should new circumstances arise.<sup>165</sup> This effect is one significant advantage of an LIR. Suppose, then, that instead of allowing the transferring party an unlimited right of revocation, this right is conditioned upon the emergence of changed circumstances. In this way, buyers would be better protected. To illustrate, if the concern in allowing governments of poor countries to sell cultural property to foreign entities is that present governments would not account for the interests of future citizens,<sup>166</sup> an LIR that allows the selling country to revoke the deal if it becomes prosperous might be a reasonable solution, which accommodates the interests of the two parties to the transaction.

An LIR conditioned upon changed circumstances would work only if those circumstances are verifiable—that is, objective, and not just alleged by the party seeking to revoke. Thus, a right of revocation conditioned upon a new understanding or changed preferences<sup>167</sup> (two important possible effects that might arise after the time of contracting, and whose potential existence supports a full-blown LIR) could make such an LIR difficult to administer. Receiving new information after contracting<sup>168</sup>—another effect that might lead someone to revoke the deal under an LIR—falls somewhere between objective circumstances and subjective effects: On the one hand, the occurrence of new information might be verifiable; but on the other, it is often hard to determine whether that information really is new for the seller, and furthermore, whether it is the real cause of the decision to revoke the deal. Indeed, the emergence of new information could serve to camouflage other reasons that motivated the seller to revoke the deal.

## 3. LIR Coupled with Seller's Liability

So far, we have discussed an LIR under which revocation entails no liability on the part of the one revoking. The deal is undone and both sides are returned to their pre-deal positions. Alternatively, the right of revocation could be conditioned upon damage payment by the revoking party. In the most extreme version, the payment would be for expectation damages. This version could hardly be called an LIR—most of our entitlements are thusly protected and rightly considered as protected by a property rule. To label it an LIR would be to trivialize the idea of an LIR. Thus, in contracts, when expectation damages (rather than specific performance) is the remedy granted by courts, the entitlement sold under the contract is protected not by an LIR, but by a property rule (although the entitlement of the buyer to receive performance under the contract is protected by a liability rather than a property rule, because she cannot specifically enforce the contract).

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165. See *supra* Section II.A.1.

166. See *supra* notes 138–41 and accompanying text.

167. See *supra* Sections II.A.3–4.

168. See *supra* Section II.A.2.

But what if damages for revocation are limited to reliance losses, and even less? Indeed, with liability in case of revocation, the buyers' interests would be better protected. Most importantly, the risk of strategic behaviors by transferors would diminish. At the same time, however, the higher the damages in case of revocation, the less effective the LIR is in mitigating the concerns that in the absence of an LIR would justify an inalienability rule.

One could characterize LIRs as existing along a spectrum. At one pole, the actor has a right to revoke the transaction with no penalties; at the other pole, the buyer has the right to full contract remedies if the deal is revoked. In between, there are all other cases, whereby less-than-full remedies are granted. The choice of the law as to how to structure an LIR to protect a specific entitlement should account for the concerns relating to the transferor (discussed at length in Part III of this Article) but also for the concerns relating to the buyer (raised in the previous sections of this Part of the Article). Practical considerations should count as well, and, in particular, courts should not tailor LIRs in a case-by-case fashion. Otherwise, contractual parties would face uncertainty which is likely to be detrimental to their ability to rely on the contract and plan accordingly. Therefore, adequate LIRs should be adapted for certain categories of cases, given the specific context and concerns involved, so that parties would be able to know in advance whether an LIR, property, or inalienability rule governs their relationship.

In sum, lawmakers or courts seeking to adapt an LIR for a category of cases might consider these main variables: the remedies available to the buyer (as we have just explained), the length of time for revoking the deal (section 1), and in some cases, the conditions under which revocation would take place (section 2). In general, the shorter the time for revocation and the more limited the right of revocation, the lower the damages owed, and vice-versa.

## V. APPLICATION: SELLING CULTURAL PROPERTY

In this Part of the article, we apply our theory of LIRs to the case of selling cultural property by governments and individuals. Interestingly, legal jurisdictions divide as to whether such property should be protected by property or inalienability rules. We show below how an LIR might often be the best compromise between the two extreme solutions.

### A. PREVAILING LAW

Cultural heritage property is a property of archaeological, prehistorical, historical, literary, artistic, or scientific significance.<sup>169</sup> Almost all countries worldwide

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169. See Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter *UNESCO Convention*]; see also Craig M. Bargher, *The Export of Cultural Property and United States Policy*, 4 DEPAUL-LCA J. ART & ENT. L. 189, 190–92 (1994) (arguing that there are many different approaches to the definition of the term “cultural property” and presenting the main definitions that various commentators have suggested).



restrict the power of both citizens and governments to export such property, so as “to prevent the loss of significant items which are needed for the national collection.”<sup>170</sup> Nevertheless, despite these restrictions, citizens (mostly in poor countries) are often tempted to collect items of cultural property and sell them to smugglers who sell them to museums, dealers in antiquities, and private collectors (mostly in wealthier countries). In the process of removing the items from where they were found, the removed items and the items left behind are often damaged.<sup>171</sup>

As a response to this problem, an international treaty, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO Convention”),<sup>172</sup> was drafted and signed by 115 countries including the United States, and requires collaboration among states in enforcing the domestic laws restricting the export of cultural property.<sup>173</sup> In 1983, the Convention on Cultural Property Implementation Act (CPIA) was enacted,<sup>174</sup> enabling the government to implement parts of the UNESCO Convention within the United States.<sup>175</sup>

More importantly, one could ask whether restrictions on the international market for cultural property are welfare enhancing. Thus, Eric Posner argued that

cultural property, like any other form of property, is valuable to the extent that people care about it and are willing to pay to consume or enjoy it. If cultural property is “normal” property, then there is no reason to regulate it, or to treat it as different from other forms of property. In an unregulated market, the people who value it most will buy it. If a great many people value it, then we might observe what we in fact observe in many settings—museums purchasing the most valuable cultural property and showing it to numerous people for a fee.<sup>176</sup>

170. PROTTE & O’KEEFE, *supra* note 141, at vi.

171. See Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213, 217–18 (2007).

172. UNESCO Convention, *supra* note 169.

173. The list of the parties to the treaty is available at *Conventions: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, 14 November 1970, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha> [<https://perma.cc/QZS7-RZ8L>] (last visited Sept. 30, 2018).

174. Pub. L. No. 97-446, 96 Stat. 2329 (1982) (codified as amended at 19 U.S.C. §§ 2601–2613 (2012)).

175. The Act enables the U.S. government to implement articles 7(b)(1) and 9 of the UNESCO Convention. Under the CPIA, the states that are parties to the convention may request that the United States restrict the import of cultural property from the requested state into the United States. The President’s Cultural Property Advisory Committee (the CPAC) reviews those requests. For a general review of the CPIA and CPAC, see James Cuno, *U.S. Art Museums and Cultural Property*, 16 CONN. J. INT’L L. 189 (2001) and Erin Thompson, Note, *The Relationship Between Tax Deductions and the Market for Unprovenanced Antiquities*, 33 COLUM. J.L. & ARTS 241, 253–54 (2010).

176. Posner, *supra* note 171, at 222; see also Lisa Marie Rafanelli, Note, *A Comparative Study of Cultural Property Import Regulation: The United States, the United Kingdom and Canada*, 15 COLUM.-VLA J.L. & ARTS 543–44 (1991) (“[F]ree trade enables cultural property to go to those who value it most, thus encouraging its preservation, care, study, exhibition, and use for the education of the greatest number of people.”).

However, as we have mentioned, almost all countries have at least some control over the export of their cultural property. Some countries legislated prohibitions on export with some exceptions, whereas other countries have restrictions of a more limited scope.<sup>177</sup> The restrictions vary substantially regarding both the types of the property to which they apply and in the methods of regulating their export.<sup>178</sup>

In the United States, there are relatively few restrictions on the export of cultural property.<sup>179</sup> These restrictions are limited to the protection of historically, architecturally, or archaeologically significant objects on land that is owned,

177. See PROTTE & O'KEEFE, *supra* note 141, at vi (“The degree of control exercised varies considerably. In some countries it amounts to a total prohibition, though in almost every case, temporary export for exhibition is allowed and other exceptions, such as those for international exchanges, or for restoration and research are permitted, though sometimes under stringent conditions.”).

178. See *id.* (“There is also great variety in the definition of cultural property subject to export control. Some countries apply it only to archaeological objects; others also to objects of artistic, historic or ethnographic interest.”); Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property Are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 601 (2007) (“Nearly every nation, especially those rich in art antiquities, has some form of restriction on cultural property alienation.”); Robert L. Tucker, *Stolen Art, Looted Antiquities, and the Insurable Interest Requirement*, 29 QUINNIPIAC L.R. 611, 626 (2011) (arguing that “almost every country in the world restricts and regulates the export of cultural property,” and that “[i]n general, these restrictions may take the form of 1) a total embargo prohibiting the export of all protected cultural property (which may be defined to include all or virtually all art); 2) one of several export licensing systems; 3) taxation incentives or disincentives; or 4) some combination of these”); John E. Putnam II, Note, *Common Markets and Cultural Identity: Cultural Property Export Restrictions in the European Economic Community*, 1992 U. CHI. LEGAL F. 457, 458–64 (“Today, all of the Member States of the [European Community] place some restrictions on the export of cultural property. The restrictions vary widely both in the scope of objects protected as ‘national treasures’ and in the methods of regulation.” (footnote omitted)).

179. See Bargher, *supra* note 169, at 189 (“The United States, unlike most nations, has almost no restrictions on the export of cultural property . . . .”); Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 314 & n.71 (1982) (stating that the United States is among the few countries that do not restrict or regulate the export of cultural property); Patty Gerstenblith, *supra* note 124, at 563 (“[T]he United States has made no attempt to restrict export of cultural property from its shores . . . .”); Barbara T. Hoffman, *International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 159, 159 (Barbara T. Hoffman ed., 2006) (“The United States is perhaps unique in that it has no export restrictions on works of art. There are, however, growing limits on the export of archaeological objects and Native American cultural objects.” (emphasis added) (citation omitted)).

There may be many explanations for the highly limited export restrictions in the United States. See, e.g., PATTY GERSTENBLITH, THE PROTECTION OF CULTURAL PROPERTY AND THE CIRCULATION OF CULTURAL OBJECTS: NATIONAL REPORT — THE UNITED STATES 5, 13–14, [http://www.gdri-droit-patrimoine-culturel.cnrs.fr/sites/default/fichiers/rapport\\_usa.pdf](http://www.gdri-droit-patrimoine-culturel.cnrs.fr/sites/default/fichiers/rapport_usa.pdf) (last visited Sept. 30, 2018) (arguing that “the strong protection given to private rights in property, which are guaranteed by the U.S. Constitution” acts to “limit[] the ability of the government to regulate private property”); Cuno, *supra* note 175, at 189 (arguing that the U.S. government “takes an internationalist position with regard to culture”—that is, “citizens of other countries benefit from exposure to American works of art” and vice versa—and therefore the U.S. government has made few laws restricting the export of cultural property); Robert K. Paterson, *Moving Culture: The Future of National Cultural Property Export Controls*, 18 SW. J. INT’L L. 287, 287 (2011) (offering explanations for the scarcity of export restrictions in the United States, including “opposition from dealers and collectors and perhaps a perception that there are adequate resources available inside the United States to acquire objects about to be sold abroad which might be seen as nationally important”).

controlled, or acquired by the federal government, and to objects created by American artists or related to American topics, which the government controls.<sup>180</sup> The declared purposes of those restrictions are to conserve the United States' national heritage and to guarantee that the spirit and direction of the Nation are founded upon and reflected in its historical past.<sup>181</sup> Still, U.S. law does not prohibit the export of cultural property owned by art dealers, museums, or private collectors.<sup>182</sup>

#### B. LIR AS A COMPROMISE

Imagine Country A, which, because of its desire to retain its cultural property, severely restricts the export of such.<sup>183</sup> These restrictions protect the entitlement holders via inalienability rules. The reasons are some of those discussed throughout this Article. We start with negative externalities.<sup>184</sup>

With no effective restrictions on export, Country A might lose much of its cultural property to other (typically wealthier) countries. The beneficiaries would be the purchasers and the sellers. The losers would be the citizens of Country A who no longer have the opportunity to enjoy the cultural property (nor benefit from the money paid for it). If the government, rather than individual citizens, owns much of the cultural property, with no restriction on export binding it, the government might ignore (or discount) the interests of future generations of citizens

180. See Bargher, *supra* note 169, at 200–01 (“Congress has enacted legislation which protects and preserves cultural property in the United States. This legislation includes the American Antiquities Preservation Act of 1982, the Archaeological Resources Protection Act of 1979, the National Environmental Policy Act of 1969, the National Historic Preservation Act of 1966, the Historic Sites Act of 1936, and the Lieber Code of 1863. The protection of most of this legislation extends only to objects and structures of historic, architectural, or archaeological importance, existing on lands which the Government owns or controls, or objects and structures which the Government has bought or received as gifts. In addition, the statutes only protect objects created by American artists or related to American topics, which the Government controls.” (footnotes omitted)). Bargher gives examples of protected structures and objects, such as the “Statue of Liberty, presidential residences, and objects owned by the Smithsonian Institution.” *Id.* at 200; see also Cuno, *supra* note 175, at 189. Additionally, if “an object is obtained in violation of another law, such as the Archaeological Resources Protection Act or the Native American Graves Protection and Repatriation Act, then its export is prohibited.” GERSTENBLITH, *supra* note 179, at 23.

181. See Allan D. Barton, *Accounting for Public Heritage Facilities – Assets or Liabilities of the Government?*, 13 ACCT., AUDITING & ACCOUNTABILITY J. 219, 221 (2000) (arguing that public heritage facilities “act as a unifying medium to bring citizens closer together as members of a nation, to take more pride in it and to appreciate more fully its history and culture”); James J. Fishman & Susan Metzger, *Protecting America’s Cultural and Historical Patrimony*, 4 SYRACUSE J. INT’L L. & COM. 57, 65 (1976) (citing the National Historic Preservation Act of 1966, 16 U.S.C. § 470 (1970), and arguing that the “purposes of legislation relating to the preservation of art work, as provided by their language, are: conserving the ‘national patrimony,’ insuring that the ‘spirit and direction of the Nation are founded upon and reflected in its historical past,’ and such legislation seeks ‘to give a sense of orientation to the American people’” (footnote omitted)).

182. See Bargher, *supra* note 169, at 200–01 (discussing U.S. export laws and policies and suggesting that the United States adopt legislation that restricts the export of its cultural property).

183. For example, Bulgaria, China, the former Soviet Union, and Zaire used to impose a prohibition on the export of all protected cultural property. See Bator, *supra* note 179, at 315 n.73.

184. For a discussion regarding negative externalities, see *supra* Section III.E, and in particular *supra* note 142 and accompanying text.

who would be better off with the cultural property being held in Country A's territory. Consequently, Country A's government might sell this property at a price that does not reflect the loss to future generations (and maybe also to current citizens whom the government is not adequately concerned with). In sum, exporting cultural property—by either citizens or the government—might adversely affect third parties and hence would likely be a welfare-reducing activity.<sup>185</sup>

Consider next the justification for inalienability based on personhood concerns.<sup>186</sup> This justification is typically applied to natural entities but it might apply, analogically, to nations as well.<sup>187</sup> With no restriction on export, poor Country A might strip itself of all its cultural assets. This might be harmful to its identity as a nation—as well as to the identity and dignity of its citizens.

Finally, distributive justice concerns might also play a role.<sup>188</sup> Here, the risk is that Country A's citizens and government, because of weak bargaining power and a desperate need for money, would sell cultural property at low prices to rich foreign purchasers.<sup>189</sup> This concern should be distinguished from the negative externalities concern: even if the government of Country A fairly represents all current and future citizens alike (so there are no negative externalities), it would give up cultural property at a low price leaving much of the transaction's surplus to the purchasers.

Making entitlements for cultural property inalienable would eliminate all the concerns discussed above; but this is not cost-free.<sup>190</sup> First, an inalienability rule would deprive countries, and private owners, of the benefits they could derive from selling cultural property. Second, it would curtail owners' autonomy. Third, it would deprive purchasers as well as many third parties of the benefits of the deal. The latter are people (often the general public) who can derive benefits from the exposure to the cultural property when it is in the purchasers' hands (typically a museum in a rich country), but not when it is at the possession of the original

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185. Cf. generally Barton, *supra* note 181 (arguing that there are negative externalities regarding the use and sale of heritage property, due to their public good characteristics of nonrivalry and nonexcludable consumption, and suggesting that they should be maintained and preserved for the enjoyment of future generations). Barton also points out that the "trustee notion of government was first proposed by the famous political philosopher, John Locke, who argued . . . that the government is a trust empowered by the people to care for the long-term interests of the nation." *Id.* at 231–32. Barton continues, "The preservation and conservation of heritage assets for the social benefit of the people over the long term are a logical component of this trusteeship theory of government." *Id.* at 232.

186. For a discussion regarding personhood, see *supra* Section III.D.

187. See John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1190–93 (1989) (implicating Radin's theory of personal property to group ownership of cultural property); see also Gerstenblith, *supra* note 124, at 570 (discussing the effect that cultural property has on a cultural group's identity and implanting Radin's theory onto this effect).

188. For a discussion regarding distributive justice, see *supra* Section III.C.

189. See Rafanelli, *supra* note 176, at 545 ("[O]nly economically powerful countries can regularly spend the large sums of money required to purchase, preserve or study cultural property. The view favoring regulation of the movement of cultural property focuses on inequities in the economic power of different countries. According to this argument, free trade leads to exploitation of economically poor but art rich nations.").

190. Some of the explanation presented next may explain why the United States has relatively few export restrictions on cultural property. See *supra* note 179 and accompanying text.

owner (typically in a poor country).<sup>191</sup> Fourth and finally, sometimes, selling the cultural property would ensure its preservation, especially when it could be damaged or looted in the country of origin.<sup>192</sup>

Probably, all these considerations both for and against the alienability of cultural property led most countries to adopt compromises. Such compromises restrict the export of cultural property in general and/or require government control in some cases. Those compromises, however, can hardly solve the problem of protecting cultural property from the government itself.

LIRs might be another compromise between full alienability and inalienability rules, and they should be effective even in restricting the government.<sup>193</sup> Under LIRs, sellers of cultural properties would have an inalienable right to revoke the deal even after decades, and regain the property after returning the money they received (with proper adjustments to account for the use value of the property and the money, at the purchaser's and seller's hands, respectively).

Let us assume first that the seller is the government. Under LIRs, the negative externalities concern is mitigated because future generations (through their future governments) would be able to revoke the deal once they realize that their interests were compromised. The personhood (or an analogical) concern would also be mitigated because the right to revoke the deal and regain the property leaves the original owner with some long-term relationship to the property; although the entitlement was transferred, it can be regained anytime. Finally, the distributive justice concern would also become less troubling with an LIR, if the purchaser, knowing the seller has a right of revocation, offers a more generous deal, making revocation less likely. True, sometimes the purchaser would offer low payments, expecting future renegotiation with the seller if she considers revoking the deal. But even such renegotiation, which would be undertaken in the shadow of the seller's right of revocation, would have desirable distributional effects on the parties: more money would be paid to the seller if the purchaser wants to retain the cultural property.<sup>194</sup>

What if the seller is a private entity? Here, to make the LIR effective in achieving its goals, the government—rather than the private entity—should have the power to revoke the deal. The question then is whether the government or the private entity should return the money paid by the purchaser. The answer to this

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191. See Rafanelli, *supra* note 176, at 544 (“One view, commonly held by art world professionals, among others, advocates free trade and exchange of cultural property, arguing that art and culture are the heritage of humanity, not just of a particular nation.”).

192. See *id.* at 563.

193. For cases in which export limitations of cultural property are imposed on the government, see Historic Places Act 1993, ss 5–6 (N.Z.), and *Australian Heritage Commission Act 1975* (Cth) s 39 (Austl.).

194. Interestingly, an LIR might have one more advantage for sellers compared to a property rule, which relates to the lack of information concern discussed *supra* Section III.A. It is often very hard for both sellers and buyers to predict the future value of cultural assets, which depends on various variables—including unexpected ones. Under a property rule, sellers (but also buyers) enter a deal that might ultimately have been a bad bargain, which they are stuck with. With an LIR, sellers (but not buyers) would be able to revoke the deal under such circumstances.

question is likely that, because the government revokes the deal, it should have the primary obligation to reimburse the purchaser for the price she paid. A secondary question is whether the government, after reimbursing the purchaser, should have an indemnification claim against the seller. The answer to this question seems to depend on whether the cultural property is returned to the government or to the seller. In the former case, the government should not be entitled to indemnification from the seller, but in the latter case it should.

#### CONCLUSION

Various theories could both justify inalienability rules and explain their existence under prevailing law: lack of information, paternalism, distributive justice, personhood, negative externalities, and external moral costs. In this Article, we place aside the question of which theory is more or less persuasive than the others. Instead, we explore the potential of an LIR to mitigate the concerns from property rules that motivate the various theories justifying inalienability rules.<sup>195</sup>

We realize that the concerns from property rules under each theory could be addressed not only by full inalienability or an LIR, but also in other ways. For example, if one opposes property rules regarding human organs for distributive justice concerns, those concerns could arguably be mitigated (also, or sometimes even better) by regulations setting minimum prices for organs. Our goal in this Article was not to discuss all possible means to mitigate property rules concerns in less drastic ways than through inalienability, but rather to focus on only one tool: the LIR.

Though there are various LIRs under current law, we argue that legislatures and courts should consider adopting LIRs in various contexts in which inalienability (and sometimes property) rules are employed currently. One way to identify the cases that might make good candidates for LIRs is to focus on those where legal jurisdictions fluctuate between inalienability and property rule protection. Among those cases are surrogacy arrangements, the sale of cultural property, and assignment of tort claims. However, there are many more such cases. LIRs should comprise one more tool in any legal system's arsenal for protecting people's entitlements.

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195. We do concede that our arguments are more or less persuasive depending on the reader's perspective and approach. For example, a reader who opposes property rules regarding women's wombs for personhood concerns might not be convinced that an LIR is a better solution than an inalienability rule.