

# Texas Law Review

Volume 81, Number 7, June 2003, Symposium

## Introduction

### “Paying the Alligator”: Precommitment in Law, Bioethics, and Constitutions

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*“It may be sooner,  
it may be later,  
but there is no escaping,  
paying the alligator.”<sup>1</sup>*

People often try to control events in the future by choosing at Time 1 to reduce their options at Time 2. When Time 2 arrives they may regret their “precommitment” and wish that they were free to make a different choice. Sometimes other people have to decide whether to give priority to the Time 1 or to the Time 2 decision with no clear guidance for how to resolve that conflict.

The phenomenon of human beings “precommitting” themselves in order to control the future is a familiar one. Its *locus classicus* is the famous passage in *The Odyssey* in which Odysseus has himself lashed to the mast after stopping the crew’s ears with wax so that he may hear the Sirens’ song without being dashed on the rocks.<sup>2</sup> Devices used to precommit in other settings include rewards, penalties, deleted options, and delay, with each use

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1. FLATLANDERS, *Pay the Alligator, on NOW AGAIN* (New West Records 2002) (quoting the song written by Joe Ely, Butch Hancock, and Jimmie Dale Gilmore). As this Introduction will show, every precommitment necessitates “paying the alligator” of time with choices forgone, either at Time 1 or Time 2.

2. HOMER, *THE ODYSSEY* 276–77 (Robert Fagles trans., Penguin Books ed., 1996). The same tale as experienced by Ulysses, Odysseus’ Roman counterpart, is often used to describe the ideas embodied by precommitment.

varying in its revocability at Time 2 and in its dependence on third party decisionmakers.

Contemporary interest in precommitment devices as a descriptive and analytic category arose in the 1970s and 1980s when Thomas Schelling and then Jon Elster took notice of them and the issues that they pose.<sup>3</sup> Since then economists, political scientists, lawyers, psychologists, and bioethicists have become interested in precommitment behavior and have used the concept to describe the special set of problems that arise when attempting to constrain future action in personal, legal, political, and social life.<sup>4</sup>

The purpose of this Symposium is to deepen understanding of such behavior and to explore ways to resolve its dilemmas and paradoxes. This Introduction will describe different types of precommitments, discuss what is special about the term, and analyze the decisional dilemmas they pose. It then discusses their use in bioethics, in constitutions, and in law generally.

### I. Types of Precommitment

The goal of constraining the future by present choices or precommitments covers a wide range of individual and group decisions. The term “precommitment” was originally understood to refer to a subset of future-directed constraints. In Jon Elster’s terms, precommitments are strategies that people use “to protect themselves against passion, preference change, and . . . time-inconsistency. They do so by removing certain options from the feasible set, by making them more costly or available only with a delay, and by insulating themselves from knowledge about their existence.”<sup>5</sup>

Time 1 commitments for Time 2 choices can take many forms and serve many purposes, both by individuals and by groups. Usually Time 1 actions alter the payoffs at Time 2 in such a way that acting contrary to one’s precommitment is burdensome, if not impossible. Some precommitments act

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3. JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979); THOMAS C. SCHELLING, *The Intimate Contest for Self-Command and Ethics, Law, and the Problem of Self Command* in CHOICE AND CONSEQUENCES 57 (1984); Thomas C. Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 AM. ECON. ASS’N PAPERS & PROCEEDINGS 1 (1984) [hereinafter *Self-Command in Practice*]. These authors acknowledge an earlier use of the concept by the economist R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUDIES 165–80 (1955).

4. See, e.g., Rebecca S. Dresser, *Ulysses and the Psychiatrists: A Legal and Policy Analysis of the Voluntary Commitment Contract*, 16 HARV. C.R.-C.L. L. REV. 777 (1982) (discussing precommitment issues raised by voluntary commitment contracts in the mental health field); Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 LEGAL THEORY 23, 34 (1997) (exploring the concept that people have present and future “selves” and that “institutions do not work perfectly, precisely because they are trying to influence the present self through the future self”).

5. JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 1 (2000).

causally and preempt Time 2 alternatives by removing options at Time 2.<sup>6</sup> In other cases, they are executory and require an additional choice by the maker or another person at Time 2 about whether or not to follow the Time 1 decision.

What is distinctive about precommitment behavior is the intention to limit future options in some way for a present or future payoff. Reason may be the spur at Time 1 to prevent passion (or interest or reason) from operating at Time 2. In other cases passion might produce Time 1 choices that seek to prevent reason or interest operating at Time 2. The motive could be self-paternalistic, as with Ulysses' self-binding contract, or more contemporaneously, as with a fictional mobster's recognition that he could not lend money to a friend because he could not "hurt him" if he were late in repaying.<sup>7</sup>

A precommitment might also arise because of hyperbolic discounting or other inconsistencies in valuing the stages of one's life, preferring satisfaction now rather than later. Faust hyperbolically overvalues the pleasures of this world, and assumes that the loss of salvation to which he precommits himself at Time 2 will be more tolerable than in fact it is.<sup>8</sup> When the time comes to give the devil his due, Faust becomes a tragic figure who has given up salvation in order to gain knowledge and experience in the world.<sup>9</sup> Social security or forced savings systems, by contrast, defer present satisfaction in order to increase it in the future.

Although precommitments usually involve external devices to bind the self at a future time, Thomas Schelling and Jon Elster note that precommitments are often used strategically to control others as well.<sup>10</sup> Cortés burned his boats in Mexico to prevent his or his soldiers own cowardice at the same time that he signaled to the Aztecs that his men would not back down.<sup>11</sup> A law against paying ransom to kidnappers is intended to

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6. The starkest example is the Doomsday Machine satirized in Stanley Kubrick's *DR. STRANGELOVE, OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB* (Columbia Pictures 1964). Once triggered, there was no turning back from universal destruction. Preemptive precommitments, however, vary in their revocability, with some leaving an escape hatch for a period of time so that a person may still change his mind. At a certain point, however, there is no escape from the Time 1 choice.

7. See Ralph Cipriato's refusal to lend money to Artie Bucco in *The Sopranos: Everybody Hurts* (HBO television broadcast, Oct. 20, 2002).

8. See JOHANN WOLFGANG VON GOETHE, *FAUST* 40, lines 1660–66 (Cyrus Hamlin ed., Walter Arndt trans., W.W. Norton & Co. 1976) ("Faust: Beyond to me makes little matter, If once this earthly world you shatter, The next may rise when this has passed. It is from out this earth my pleasures spring, It is this sun shines on my suffering; If once from these I draw asunder, Then come to pass what will and must.").

9. See *id.* at 290–94, lines 11433–11593 (recounting his life as he faces damnation under the ridiculing watch of Mephistopheles).

10. See Jon Elster, *Don't Burn Your Bridge Before You Come To It: Some Ambiguities and Complexities of Precommitment*, 81 TEXAS L. REV. 1751 (2003).

11. *Id.* at 1761.

deter kidnappers by depriving them of monetary benefits.<sup>12</sup> Entering into a contract at Time 1 is another way to get others to act in certain ways at Time 2. As with other strategic precommitments, the maker also gives up some freedom to affect the behavior of others.<sup>13</sup>

The intention to restrict future options is the hallmark of precommitment behavior. If so, Time 1 choices that constrain the maker's Time 2 choices without intending to do so are not usefully called precommitments, as Elster illustrates with examples from British constitutional history<sup>14</sup> and Robert Frank does with his idea of emotions as precommitments.<sup>15</sup> Emotions do function in a way that constrains alternative actions at Time 2, but they were not chosen for that purpose. Nor, taking an example from biology, does natural selection "precommit" an organism to reproduce only in certain environments, because there is no choice of the genotype that constrains its future. Finally, some ways of controlling future actions operate by increasing rather than decreasing the set of feasible options, and thus are not properly termed precommitments.<sup>16</sup>

Although one usually thinks about precommitment from an individualist perspective, the term is also usefully applied to group, societal, or national decisions. The analogy is not always perfect, but groups often act to bind what those groups can do at a future time. Constitutions thus often function like precommitments, as does the enactment of legislation. One can even speak of nation-states precommitting themselves to particular outcomes at Time 2 both to control their own behavior and that of other nations.

## II. What Is Special about "Precommitment"?

Focusing attention on precommitment behavior soon puts one in the position of Moliere's newly rich bourgeois who was astonished to discover that he had been speaking prose all his life.<sup>17</sup> Having found the concept of "precommitment" of theoretical interest, we are quite surprised to see that we have been using precommitments in numerous ways that seem essential to personal and social life.<sup>18</sup> Countless decisions are made at Time 1 for the

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12. Elster, *supra* note 10, at 1782. However, Elster notes that it is possible that such a law would violate a constitutional right to life. *Id.*

13. For further discussion of contracts as precommitments, see John A. Roberston, *Precommitment Issues in Bioethics*, 81 TEXAS L. REV. 1849 (2003).

14. Elster, *supra* note 10, at 1784.

15. See Robert H. Frank, *Commitment Problems in the Theory of Rational Choice*, 81 TEXAS L. REV. 1789 (2003).

16. A person's choice at Time 1 to store sperm or eggs prior to cancer treatment is to preserve fertility at Time 2, not to constrain it. See *infra* text accompanying note 43.

17. MOLIERE, *LE BOURGEOIS GENTILHOMME* [THE BOURGEOIS GENTLEMAN] 30–31 (Bernard Sahlins trans., Ivan R. Dee 2000) (1670).

18. Take, for example, the common practice of not stocking the refrigerator with ice cream so that we will not be tempted to eat it, or the ubiquity of contracts and agreements, which limit future

purpose of closing off options for ourselves or others at Time 2. Sometimes we feel regret at Time 2 that we had not made a different choice, and often try to undo the Time 1 commitment.<sup>19</sup>

So what else is new? An initial question is whether there is any need for or utility in calling such behaviors or situations “precommitments,” given that any precommitment is also a “commitment” of some sort.<sup>20</sup> The answer is that there is some purchase or utility in the concept—some value added by framing or posing an action or practice as a “precommitment” rather than simply a commitment. Because individuals often take steps at Time 1 to control events at Time 2, some additional understanding of the situation and its trade-offs may flow from this terminology. In that case, viewing individual and social actions as forms of precommitment may remind us that our Time 1 commitments have important consequences for what will happen at Time 2, and thus that we should pay special attention to the decision/commitment we are making at Time 1. It may also focus attention on the variable consequences of different ways of binding ourselves in the future and the characteristic ways those commitments are handled at Time 2.

The value added from saying that something “precommits”—rather than merely “commits”—arises from differences among commitments. It is true that all precommitments are commitments, but it does not follow that all commitments are precommitments. Precommitments are commitments that involve an intentional change in options or payoffs at Time 2 in a way that a mental resolution or commitment to oneself does not. Thus, Elster critiques Jed Rubenfeld’s concept of commitment for not recognizing the importance of future constraints.<sup>21</sup> Dan Brock also agrees that commitments leave options open at Time 2 while precommitments impose a cost or penalty at Time 2 for any deviation, if they permit change at all.<sup>22</sup> John Ferejohn and Lawrence Sager make the same point by distinguishing between “internal” and “external” commitments, with “external” commitments largely synonymous with precommitment as used in this essay.<sup>23</sup>

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freedom for present benefits. There are countless other variations. For a complete taxonomy, see ELSTER, *supra* note 5, at 6.

19. Precommitment as a strategy for managing the problems of one’s life can even turn neurotic, as the confessions of an anonymous inveterate precommitter indicate. Anonymous, Pre-Commitment: A User’s View 1 (2002) (unpublished manuscript, on file with the Texas Law Review).

20. Robert Frank and others, including my colleague Alan Rau, have questioned whether the term is simply redundant and adds nothing that “commitment” does not already provide. ROBERT FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 47 n.\* (1988). More recently, Frank seems to recognize that even emotional commitments are a form of precommitment because of their subjective costs. See Frank, *supra* note 15.

21. Elster, *supra* note 10, at 1768.

22. Dan W. Brock, *Precommitment in Bioethics: Some Theoretical Issues*, 81 TEXAS L. REV. 1805 (2003).

23. John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEXAS L. REV. 1929 (2003).

Robert Frank, however, takes a different view by arguing that many commitment problems can be solved by means of the subjective internal commitment devices we often call moral emotions. For example, someone can persuade others that she will keep a promise or execute a threat, even though not doing so would be more profitable, if she can persuade others that failure to follow through would trigger sufficient emotional distress.<sup>24</sup>

In Frank's view, "subjective internal commitments" carry some sting of emotional distress, and thus can function like precommitments in that a cost is incurred at Time 2 if one is not faithful to the commitment.<sup>25</sup> Here, however, the costs are solely internal and are not externalized as they are with precommitments.

Although Robert Frank makes a useful point about the power of subjective commitments, the difference between internal and external effects is useful in characterizing the distinctiveness of precommitment. A commitment is an internal promise, with perhaps internal guilt but no external consequences at Time 2. A precommitment, however, carries external consequences, if only the reduced reputation of someone who announces a resolution to do an action which he or she does not then carry out.<sup>26</sup> The value of the term "precommitment" is the attention it directs to present actions which will constrain future actions in various ways, and the consequences of permitting them to occur preemptively at Time 1 or to be honored or ignored by decisionmakers at Time 2.

### III. Which Self To Prefer: The Precommitment Dilemma

Precommitment behavior is ubiquitous and of wide interest because of the dilemmas it poses for human attempts to control the future by altering future options, and the pressures to then renege on that planning once that future time comes about. For me the interesting question is whether the earlier or later self should control. Given the time-extendedness of our lives and endeavors, why should Time 1 preferences not control at Time 2? If not, one may be unduly limited in his ability to carry out plans and projects that necessarily involve future actions. Then again, why should Time 1 preferences control at Time 2 if how the person would feel at Time 2 was not

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24. Frank, *supra* note 15, at 1801.

25. This may be one reason why Frank finds no special purchase in the term. For him all commitments bind, if only internally. *See id.*

26. Elster uses the example of DeGaulle announcing that he was quitting smoking, knowing that if he did not follow through his *amour-propre* would suffer too much. *See* Elster, *supra* note 10, at 1754. Similarly, politicians who pledge to serve only two terms may incur significant political costs if they then seek a third term. Philip Shenon, *Wellstone Campaigns in Race He Pledged Not to Run*, N.Y. TIMES, Sept. 3, 2001, at A12 (noting that the late Paul Wellstone's decision to seek a third term after announcing that he would only serve two terms could have sparked disdain among Minnesota voters). *See also* Ferejohn & Sager, *supra* note 23.

precisely known at Time 1, and now that Time 2 has arrived, the person has a quite different view of his preference than he had previously envisaged?

Such questions present dilemmas because there is no clear or easy way to determine which self over time should be allowed to control. Having “temporally-extended” goals, purposes, projects, or intentions is central to human lives. Extreme presentism, as Jed Rubenfeld has shown, would be a nightmare—a book of pages without a plot or spine.<sup>27</sup> Perhaps Ram Dass is correct that we should “Be Here Now,” but our being here now is always involved with the future.<sup>28</sup> Indeed, our being largely consists of “being about to be,” as the late poet A.R. Ammons put it, thus creating the tendency to try to structure or control what happens in future states of being.<sup>29</sup>

On this view of personhood, great leeway should be accorded to persons to plan and project their lives, including making binding precommitments. The rub, of course, is that at Time 2 one is not free easily, if at all, to alter plans or projects to which one committed at Time 1. At Time 2 one must “pay the alligator,” even if one has second thoughts about the earlier choice and wishes a different commitment had been made.<sup>30</sup> The gain in Time 1 control would be paid in the currency of Time 2 freedom—when needs, preferences, plans, and situations may have changed drastically. Yet if the Time 1 precommitment is not enforced, one will still be “paying the alligator,” but now in the coin of freedom at Time 1 to exercise control over Time 2 events.

The recurring problem posed by precommitment behavior arises from the conflict between different temporal stages or aspects of the self. If the present (Time 1) self can make decisions affecting the future (Time 2) self, the Time 2 self will be constrained by those choices yet have had no say in them. Imposing constraints on others without their consent ordinarily raises serious moral problems. If imposed by earlier stages of the self, however, they appear to be part of how one constructs one’s life. Yet because they are imposed by an earlier stage of the self, when the Time 2 self was not present, they too can be perceived as imposed by “another”—in this case, the earlier self.<sup>31</sup> How should we decide whether Time 1 or Time 2 choices should be

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27. See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 6–7 (2001) (explaining that to live in the present itself requires memory and the ability to project into the future).

28. BABA RAM DASS, *BE HERE NOW* (1971).

29. A.R. Ammons, *Boon*, *THE NEW REPUBLIC*, Aug. 1, 1988, at 48.

30. See FLATLANDERS, *supra* note 1 and accompanying text.

31. Other scholars have noted the conflict as well, with some analogizing to a collective action problem. See *Self-Command in Practice*, *supra* note 3, at 7 (noting that precommitment is based on promises running between two different selves); Posner, *supra* note 4, at 34 (noting that the future “self” is a different person and therefore has strong arguments to disregard prior commitments); RUBENFELD, *supra* note 27, at 128 (stating that there is no inherent punishment for not following through on one’s own commitments to one’s self).

given priority? Are there criteria serviceable across a range of situations for determining which choice should control?

Dan Brock has provided a helpful analysis of the precommitment dilemma by focusing on two questions: (1) which self should have priority; and (2) which self should third parties respect.<sup>32</sup> With regard to the first question, he asks why present (Time 1) autonomy should control future (Time 2) autonomy?<sup>33</sup> If present autonomy is an important liberty, then it will also be important when the future becomes present at Time 2. At that point, there is no reason why the earlier present self should be given priority just because it came earlier. Putting aside issues of passion and weakness of the will, he finds that the Time 1 self has no inherent claim of privilege over the Time 2 self.

Some would argue that such binding is essential for autonomous selves to construct their lives. An essential feature, however, of constructing a life is revising the structure and shape of that life as one grows, has different experiences, and revises one's life plan. Deprivation of the ability to change or reorient oneself later in time would decrease overall autonomy, even if it increased autonomy at an earlier stage. As Brock contends:

Autonomy also involves our capacity to revise over time our conception of the good and our plans of life and then to carry out that revised life plan in the future. This implies that we have reason to limit the extent to which our present choices will close off making and acting on those revisions in our values and life plans. Since many conflicts between our present and future desires and values are a result of this process of autonomously revising our life plans, we have good reason to limit our use of commitments so as not to unduly restrict our future autonomy, capacity and opportunity to act on our revised values and life plan.<sup>34</sup>

Brock's second question—which self should other persons favor—raises other complications. Because he has already found that Time 1 autonomy has no special claim over Time 2 outcomes, other persons would ordinarily have no obligation to follow the Time 1 preferences of others. Although Brock recognizes that Time 1 directives to overcome defects of reason or choice should have some validity, he shows that many precommitment dilemmas do not involve defects of reason, but rather differences in a person's more fundamental evaluative or critical commitments. If so, there is no way to decide which evaluative commitment should have priority, just as there is no way to decide which stage of autonomy is most valuable. Based on this analysis, he finds no reason why the precommitments in standard puzzles in precommitment theory—the paraplegic, the surrogate mother, the

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32. Brock, *supra* note 22, at 1809.

33. *Id.* at 1810.

34. *Id.* at 1815–16.



dying atheist, and the Russian nobleman cases—should be honored.<sup>35</sup> None of those precommitments aim to avoid defects of reason at Time 2. Rather, they are all attempts to prevent the exercise of autonomy or critical reevaluation at Time 2.

That said, it does not follow that giving priority to Time 1 critical decisions is always inappropriate. Even if there is no moral obligation to prefer Time 1 choices, there may be circumstances in which it is both fair and good policy to do so. An essential aspect of precommitment behavior, however, is that there may be no algorithm or set of rules for which stage of the self should be preferred. That judgment is highly dependent on the context and circumstances of the choice and requires a pragmatic weighing and balancing of various factors as situations involving precommitment arise.<sup>36</sup>

As I will show, two categories of precommitment are generally respected, while others are honored more inconsistently. Time 1 precommitments that operate by deleting options at Time 2 are necessarily final once they occur. Time 1 commitments that take the form of a contractual exchange of promises with another person also have a strong presumption in their favor because of the role that contractual reliance plays in organizing resources and enhancing welfare. The more difficult cases are those involving nonpreemptive commitments not involving contract.

Many areas of personal, legal, and social life could have been chosen to illustrate precommitment behavior and the dilemmas and paradoxes that they pose. This Symposium focuses on precommitment in bioethics, constitutionalism, and international law. Bioethics exemplifies issues that arise from individual uses of precommitment while constitutionalism and international law illustrate group and social issues. Together they deepen our knowledge of precommitment behavior and social and legal reactions to it.

#### IV. Bioethics and Precommitment

Bioethics concerns the ethics, norms, and laws that arise out of medical practice and innovation and often involves questions that involve the extension or creation of life. Precommitment devices and issues are used in many areas of bioethics. Most precommitment devices in bioethics are quite familiar but have a special poignancy because the life or death of a loved one or the family status of couples and children are at stake. Others, such as

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35. *Id.* at 1821.

36. Relevant factors might include how knowing, informed, and deliberate the Time 1 choice was, whether it is preemptive or executory, the physical and other burdens of going with Time 2 or Time 1 preferences at Time 2, and whether others relied on the precommitment in a significant way. Robert Frank's examples of two contracts made for a situation of terminal illness, one of which should be enforced and the other which should not be, is a useful illustration of the fact and context dependence of the decision of which temporal self to favor. *See* Frank, *supra* note 20, at 1801.

advance directives for nontreatment of persons when they are incompetent, present a variation on precommitment behavior that has received little attention elsewhere.

Structured delay, information transfer, and advance review are precommitment devices that play an important role in many medical settings as well as elsewhere. They are not chosen by the individual, but rather are imposed by society or by standards of medical practice norms to ensure that the choice that they protect is made knowingly and with due consideration. They are usually required when the medical decision at issue poses significant risks or a substantial impact on an individual. A notable example is the Oregon law that permits physician-assisted suicide only after the patient has made the request twice over a two-week period and had his competency assessed by two doctors.<sup>37</sup> Similarly, many European countries and U.S. states require waiting periods before a woman can obtain an abortion in order to ensure that she is making a free, informed, and considered choice.<sup>38</sup> Although ostensibly justified as a device to make sure that the choice is knowing and considered, waiting periods in the U.S. context also serve as a way to limit or deter the number of abortions. The use of institutional review boards to pass on human subjects research also places constraints on Time 2 choices to ensure compliance with Time 1 norms of ethical research.<sup>39</sup> Many precommitments in bioethics are intended to affect a future time when the person is competent but, for various reasons, may be unavailable to consent to medical treatment or research at that time. The issue of advance consent for biomedical research with bodily tissue, DNA, medical records, and frozen embryos is such an example. Advance waivers can in theory be overridden at Time 2, but, if they are officially recognized, there may be few occasions in which the issue is even raised. The different devices that have emerged for balancing advance consent, present autonomy, and research efficiency show how context-driven acceptable precommitment solutions are.<sup>40</sup>

More unique to bioethics are directives made at Time 1 to control actions at Time 2 when the actor is incompetent or unable to express a

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37. See OR. REV. STAT. § 127.850 (2001) (requiring a minimum 15-day waiting period from the patient's oral request and 48 hours from a written request before the writing of the necessary prescription); OR. REV. STAT. § 127.825 (2001) (requiring the attending or consulting physician to send the patient to counseling if the patient "may be suffering from a psychiatric or psychological disorder or depression").

38. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 887 (1992) (upholding a 24-hour waiting period and the requirement of informed consent before an abortion could be obtained); MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) (surveying the waiting periods for abortion in Europe).

39. See John A. Robertson, *The Law of Institutional Review Boards*, 26 UCLA L. REV. 484, 484-86 (1979) (discussing how institutional review boards are structured to ensure compliance with substantive and procedural standards of research ethics).

40. See Robertson, *supra* note 13 (describing precommitment issues in various bioethics contexts).

contemporaneous wish. The usual precommitment problem at Time 2 of the maker now objecting to her Time 1 choice does not arise because the maker is incompetent to exercise autonomy at Time 2. Yet the maker may still have interests that the Time 1 directive could impair, thus raising the enforcement problem in a different guise. Such practices have received enormous attention in the medical, bioethical, and legal literature but have received little attention from precommitment theorists. One could question whether they are true precommitments because no self is competent at Time 2 to object to the Time 1 choice.<sup>41</sup> But since the Time 2 self has interests which could be adversely affected by the Time 1 choice, they are usefully discussed as a precommitment device to control future states of incompetency.<sup>42</sup>

Precommitments in the form of contract play an important role in assisted reproductive practices that involve storage of gametes and embryos or that use donors and surrogates to provide missing reproductive factors. Such transactions usually include agreements for transfer or disposition of gametes, gestational capacity, and rearing rights and duties in resulting offspring. Sometimes the person bound at Time 2 to relinquish gametes, embryos, or children objects, and issues about the validity of their Time 1 precommitment arise. These questions have been especially salient in surrogate motherhood and in disposition of frozen embryos by a couple after divorce.<sup>43</sup> Ultimately, reproductive precommitments raise questions about whether the reliance interest of the nonbreaching party justifies enforcing the contractual promise.

Many decisions made in biomedical settings to affect future decisions are not usefully labeled as precommitments. As previously noted, actions taken at Time 1 to preserve or expand Time 2 options are not appropriately thought of as precommitments because they increase the feasible set of future options rather than restrict them. Women who have eggs removed and frozen in their early twenties to preserve their fertility in their thirties and forties are taking action to preserve reproductive options at that later time, not to exercise them in particular ways. A Time 1 directive about what

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41. See Brock, *supra* note 22, at 1808–09 (arguing that an advance directive is not a precommitment if the person at Time 2 is incompetent).

42. Different problems arise if the precommitment applies to events after the maker's death, as in wills, directions imposed on posthumous reproduction, or directives that if murdered, the victim does not want the death penalty imposed on the murderer. In these cases, there is no conflict between a self at Time 1 and Time 2, but there may be conflict between a person's Time 1 preferences and the interests of other persons that would be affected by enforcing the Time 1 commitment. If a murder victim's directive against capital punishment for the murderer were given effect, it would deprive the state of the ability to impose a punishment that jurors might have found appropriate. See Heather J. Gert, *The Death Penalty and Victim's Rights: Legal Advance Directives*, 33 J. VALUE INQUIRY 457, 467 (1998) ("Perhaps society, or its representatives, in the form of prosecutor, judge and jury, should not reduce the criminal's penalty, even at the request of the victim, because to do so would be detrimental to other members of society.").

43. Robertson, *supra* note 40, at 1868–72.

should be done with those eggs in case she is unavailable or incompetent to decide would be more akin to a precommitment.<sup>44</sup>

Nor is it helpful to refer to the possibility of selecting or shaping offspring genomes as a “precommitment” to a particular kind of child. Such actions are still quite hypothetical, though some degree of negative selection or exclusion of children with certain genetic traits is now possible. If it ever does become possible, then talk about “choice” of offspring traits, with its attendant individual, family, and social risks and benefits should adequately describe the situation. Except for some very special circumstances, talk of precommitment in those cases will add little to an understanding of such choices.<sup>45</sup> The importance of Time 1 genetic choices in constraining the Time 2 actions of both parents and children will be obvious.

## V. Constitutions as Precommitments

Some scholars have also found the concept of precommitment useful in thinking about constitutional government. Constitutions appear to be societal precommitments for how political power will be exercised in the future. As Stephen Holmes famously put it, constitutions and their protection of rights might be thought of as devices made by “Peter Sober” to protect himself against the actions of “Peter Drunk.”<sup>46</sup>

Some have met the application of precommitment concepts to constitutions and constitutional law with skepticism that it has anything interesting to add to constitutional scholarship.<sup>47</sup> Constitutions are attempts by the framers to bind themselves and those who come later, but a reliance on an exercise of prior autonomy cannot bind persons who never existed when the constitution was made, or if they did exist, did not agree with the results reached. Nor is it clear how an individualistic notion of self-binding over time applies to groups of thousands or millions of persons, none of whom were present at the framing of constitutional rules.

Moreover, the idea that a sober Peter may be protecting himself against a drunk Peter may be a myth. Elster’s categories of passion, interest, and reason motivating precommitment behavior are very useful here.<sup>48</sup> As he and Jed Rubenfeld note, it is often the emotion and passion that foment the

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44. See discussion of posthumous reproduction in *id.* at 1872–75.

45. An exception would be when the use of precommitment language helps to impress upon the parents the irrevocability of the effects on the child, and the parenting experiences they will face at Time 2 as a result of their Time 1 genetic engineering.

46. Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 196 (Jon Elster & Rune Slagstad eds., 1988) (arguing that constitutions disempower temporary majorities in the name of binding norms).

47. See, e.g., Jeremy Waldron, *Precommitment and Disagreement*, in CONSTITUTIONALISM 271–99 (Larry Alexander ed., 1998).

48. Elster, *supra* note 10, at 1755.

revolution and change that leads to the making of constitutions.<sup>49</sup> Not surprisingly, constitutions contain provisions that in the light of reason seem unwise. Indeed, they may even want to act in passion at Time 1 rather than use reason at Time 2 because they suspect that with a cooler head they may not be able to take the punitive action that they now think is deserved.<sup>50</sup> Rubenfeld makes this point with the example of the Fourteenth Amendment and its later gutting by Supreme Court Justices in the 1870s who were no longer caught up in the passions that had led to its enactment.<sup>51</sup>

Despite scholarly critique of constitutions as precommitments, the idea may still have some utility. Elster, who first suggested the idea and then critiqued it, now recognizes that “the concept may nevertheless be retained.”<sup>52</sup> He finds that precommitments are best seen as occupying a continuum rather than an all or nothing essentialist existence. Although the idea of a collectivity made up of numerous individuals binding itself may be a convenient fiction, we can distinguish differences in how strongly the purported binding occurs. Early on constitutions will bind the drafters and ratifiers as well as those in the future. Also, most constitutions have some amendment procedure to reflect later wishes, though of course they vary in their ease of use.<sup>53</sup>

Elster also recognizes that there may be significant benefits in being bound even if they cannot be traced back to an act of self-binding intended to secure those benefits. If later generations find that they benefit greatly from constitutional restraints to which they did not consent, they may come to ratify and accept what they did not initially choose. Constitutions are constitutive of societies and how people govern themselves and others. Unless part of the founding generation, one cannot decide what constitutional

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49. RUBENFELD, *supra* note 27, at 129 (noting that passion may motivate a polity to believe that a previous course of action is no longer tolerable); Elster, *supra* note 10, at 1768–70 (“Some constitution-making processes that decisively shaped the history of their countries have had a strong basis in passion.”).

50. See Elster’s example of the Belgian experience with shooting collaborators immediately after World War II because of a recognition that if they delayed, their passion for payback might lessen, and they would then be less likely to treat them with the harshness which at Time 1 they thought was due. Elster, *supra* note 10, at 1767.

51. RUBENFELD, *supra* note 27, at 129–30 (arguing that constitutional provisions tend to be enacted at times of high political passion, with the Fourteenth Amendment being a notorious example of an amendment having its most important provision eviscerated in a time distant from its enactment).

52. Elster, *supra* note 10, at 1760–61.

53. If too easy to amend, for example, a 51% majority, the majority can entrench its own power by passing changes that then require a 75% majority to undo. This may also be done by special provisions for certain amendments, such that they cannot themselves be changed by the usual process of amendment. For example, Article V of the U.S. Constitution sets out a procedure for constitutional amendment that requires the approval of 75% of the states and both houses of Congress. However, to change the number of senators per state, an amendment approved by 75% of the states must also have the approval of the states affected. On constitutional amendment generally see SANFORD LEVINSON, *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (1995).

setting one is born into, and a later exit or amendment might be difficult. But one can accept it and its benefits once it is there.

This recognition is consistent with how precommitment ideas have been used in some constitutional thinking. As Samuel Issacharoff's essay in the Symposium shows, a useful way to think of precommitment in constitutional law is in terms of the procedures and machinery of the government which it creates.<sup>54</sup> Devising the procedures for running and governing society, including what powers exist and how they are transferred and allocated, is an important benefit to all. The problem for later generations is to ensure that the original power arrangement is maintained in a fair and workable form.<sup>55</sup>

Here, as in so many areas of thinking about precommitment, Elster has important insights. He is especially concerned with the problem of ensuring that the framing parties and factions do not so entrench their powers that later change and competition is not possible. Using examples from French, English, and American history, he richly describes examples of constitutional precommitment devices to prevent entrenchment of those drafting the constitution or of later powerholders. Bicameralism, delays, second and third readings, constitutional courts, and amendment rules are other forms of precommitment that institute the mistrust that saves constitutions from being devices to entrench the power of their makers.

The concept of precommitment has also been used in constitutional thinking to refer to the substantive norms which bind a legislature and prevent it from enacting laws that the majority then wants. Here Stephen Holmes's idea about sobriety constraining passion has some validity. Placing human and minority rights in a constitution does appear to be a sober decision to prevent enacting laws on the basis of transitory passions, that at a cooler time (which could be Time 1 when the provision is drafted or Time 3 when the passion for legislating has cooled) run counter to those norms. Sanford Levinson's interrogation of our fidelity to a ban on torture approaches precommitment in this sense, asking whether it should continue to be applied in the future, with or without amendment in the law.<sup>56</sup>

This aspect of precommitment and constitutionalism raises other problems (and leads scholars like Elster, Sager, and Ferejohn to suggest that constitutional precommitment is best viewed in a structural rather than a substantive sense). Because rights are necessarily specified in general, often vague, terms, a constitutional court is necessary to determine their existence and scope. Such courts protect against rigidity in the original understanding

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54. See Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEXAS L. REV. 1985 (2003).

55. Indeed, Ferejohn and Sager cite those constituted lawmaking procedures as an external commitment (a precommitment) to achieve the Constitution's substantive goals. See *supra* note 23.

56. Sanford Levinson, "Precommitment" and "Postcommitment": *The Ban on Torture In The Wake of September 11*, 81 TEXAS L. REV. 2013 (2003). Although his analysis is not, strictly speaking, constitutional, it raises comparable issues.

but also raise perennial problems of the legitimacy and scope of judicial review. The intensity of the conflict between originalist and “living constitution” views of constitutional interpretation shows how deeply conflicted a precommitment view of substantive constitutional rights becomes. To offset some of those tensions, other systems could allow judgments of unconstitutionality to be reversed by a legislative supermajority or require a supermajority of judges. In extreme cases, court-packing might also work.<sup>57</sup>

It may be that one gets more limited mileage from talking about substantive constitutional rights as precommitments than from discussing separation of powers in those terms. But in the course of resolving how originalist to be in interpreting constitutional texts, one will inevitably have to face what rights one should have now at Time 2 in light of that original commitment. The same dilemma of fidelity to an original commitment to the shape of government will arise in resolving Time 2 issues of constitutional structure and separation of powers.

John Ferejohn and Lawrence Sager provide a different slant on how constitutional mechanisms serve as precommitments.<sup>58</sup> They view judicial review and Article I and Article V procedures for making law and amending the Constitution as “external commitments” to ensure compliance with the Constitution’s “internal” substantive commitments to free speech, liberty, and other rights. It is plausible to view judicial review and possibly even the tough amendment requirements of Article V as “external” commitment devices to protect substantive rights. It is less obvious, however, how Article I procedures for lawmaking also constrain deviations from substantive constitutional norms in a way comparable to other precommitments. But since laws that comply with Article I procedures are invalid if they contravene other constitutional norms, the need to satisfy Article I lawmaking procedures seems a weak constraint. Still, their point about how lawmaking and amendment procedures serve as “external” commitments to protect “internal” normative commitments does remind us how lawmaking procedures themselves “constitute” the political order which a constitution creates.<sup>59</sup>

## VI. Precommitment in International Law

Some international law scholars have also begun to use precommitment concepts in describing aspects of international law.<sup>60</sup> Precommitment talk is

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57. Elster, *supra* note 10, at 1772–74.

58. See Ferejohn & Sager, *supra* note 23.

59. William Forbath, on the other hand, sees Article V strictures as limiting rather than protecting the ability to realize substantive constitutional norms. William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 TEXAS L. REV. 1965 (2003).

60. See Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEXAS L. REV. 2055 (2003).

appropriate here in several respects. The adoption of rules or doctrines of international law operates as a precommitment in the same way that national law does. For example, not following the doctrine of *uti posseditis* (in possession) in postcolonial boundary disputes would raise all the questions of legal stability and reliance that deviating from existing domestic laws would.<sup>61</sup>

International organizations built through the voluntary participation of sovereign nations might also be thought of as a form of precommitment by nation-states seeking to restrain the future action of other states by agreeing to restrain their own actions. Nation-states function in this context as individuals, and thus might engage in the self-binding of future behavior just as ordinary individuals might. But the price is that they bind their own future freedom in the process. Signing an international human rights treaty in order to induce other nations to observe human rights means that the signatory will incur greater costs if it engages in human rights violations. We must still grapple with the issues raised by an earlier stage of the “self” binding a later stage, but that is true with all individual and group precommitments.

Precommitment as contract is especially appropriate in talking about many international arrangements.<sup>62</sup> Nation-states agree to give up some of their sovereignty (freedom) based on the promise that other nations will do so as well. Noncompliance with the agreement will generate costs that may prevent a violation or future change from occurring. In a sense, this is constitution-making on a large scale and poses many similar problems of entrenchment and bias. The United Nations Charter entrenched the power of the original permanent members of the Security Council, including France, which has much less international importance now than it did at the time. Amending the Charter to remove France as a permanent member is near impossible because France would have to consent to the change. As Jon Elster would note, this is a good example of original drafters entrenching their power to the detriment of later nations who had much less say in the original arrangement. Without such entrenchments, however, the international entities in question might never have come into being.<sup>63</sup>

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61. See discussion *infra* Part VII. *Uti posseditis*, though a legacy of the colonial era, became a useful concept for states to agree to use in resolving border disputes. See Ratner, *supra* note 60, at 2065–68 (discussing the use of *uti posseditis* in various international border disputes).

62. My colleague Steve Ratner takes a different view of contracts as precommitments, recognizing only contracts that are intended to protect the maker against weakness of the will at Time 2. Ratner, *supra* note 60, at 2059. I view the concept of precommitment more broadly and include any device that intentionally restricts future options, regardless of the motivation for doing so. See Robertson, *supra* note 40, at 1849.

63. The entrenchment of state senatorial “equal suffrage” in the United States Constitution is another example. See U.S. CONST. art. V.



## VII. Law and Precommitment

Precommitment behavior, whether in bioethics, constitutionalism, or international law, raises several questions about law and the legal system. One question is the extent to which the law should give legal effect to Time 1 precommitments, whether preemptive or executory. With regard to a preemptive precommitment in any particular case, the question is whether the law should permit it. The acceptability of preemptive precommitments will turn on the importance of the choice or action that is preempted at Time 2. Indeed, because of their irrevocability at Time 2, preemptive precommitments may need extensive front-end protections to make sure that they are freely and knowingly made. At Time 2 the chance to remake them is gone.<sup>64</sup>

A different set of legal issues arises with executory precommitments. Legal disputes could arise when a person who sought a different Time 2 outcome than she had precommitted to now sues in tort or contract for damages for ignoring her Time 2 choice. Is a doctor liable for ignoring a patient's Time 2 pleas for pain relief when he relied on her Time 1 direction not to provide analgesics at Time 2? What if he ignored the prior directive and gave her the drugs she had previously rejected? Should a court enforce the gestational surrogate mother's agreement to relinquish the child at birth or side with the surrogate mother who now wishes to keep the child? Depending on the factual setting and the trade-offs involved, the law will recognize and enforce some executory precommitments while rejecting others, yet guidelines for distinguishing which precommitments are enforceable and which are not may be difficult to procure.

In contrast to questions about *precommitments within law*, there are also questions of *law itself as precommitment*. Law embodies many aspects of precommitment in that it creates rules at Time 1 for how Time 2 actions and disputes will be judged. When Time 2 questions arise, the legal system ordinarily looks backward to the rules that had been set down at Time 1 in order to determine how later behavior will be judged at Time 2. In Elster's terms, law reduces the feasible set of options which judges and other decisionmakers can apply to that conduct at Time 2.

The strength of *law as precommitment*, however, depends on the willingness at Time 2 to give existing law that power. Until formal law is actually changed, legal decisionmakers are bound to, and usually will, follow it. However, judges and other decisionmakers will usually have some discretion over what effect to give to previously enacted law, for example, how narrowly or broadly to interpret it. Such decisions will depend on many factors, including the actors' knowledge and freedom at Time 1, the costs and benefits of privileging Time 2 preferences despite different Time 1 legal commitments, and fidelity to legal values.

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64. Consider the discussion of waiting periods for physician-assisted suicide *supra* Part IV.

It is *law as precommitment* that Professor Sanford Levinson engages in his interesting and provocative article on torture in this Symposium.<sup>65</sup> Levinson addresses national and international precommitments against torture. He assumes that the United States has a clear and absolute prohibition against torture, though he recognizes that we may also have deviated from it in several respects.<sup>66</sup> He then addresses the problems that arise for a precommitment norm against torture when deviations from that norm are sought, as some persons would suggest might be appropriate to prevent terrorism in the wake of September 11, 2001.

There are several questions entangled here, only some of which implicate precommitment. The issue could be phrased directly as one of human rights, morality, and whether there are ever any circumstances that justify sacrificing potential innocents for the good of many more, or with suspected terrorists, of torturing them beyond the bounds of human rights and dignity to save others. Viewed *ex ante*, the question is whether we should adopt absolute rules or precommitments against torture, knowing that there may be future situations that will tempt us to employ it, or whether we should specify exceptions in advance.<sup>67</sup>

Exceptions in law pose special problems for legal theory. Specified in advance, an exception narrows the law rather than ignores it. One can question whether the exception is justified, and whether the excluded and included classes are being treated equally, but fidelity to law itself remains. More troubling is when legal decisionmakers give effect to an exception that is not legally recognized. Doing so undercuts the committed or fixed aspect of law, the important notion that law is reliable precisely because it precommits by constraining future options. Many questions about law as precommitment arise when an exception or deviation is sought from a text or provision that bans conduct in a way that now seems questionable.

Levinson's discussion of torture also addresses this aspect of the topic. He assumes that we have made an absolute commitment against torture and then asks whether we should stick to that commitment at Time 2 now that we

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65. Levinson, *supra* note 56.

66. Levinson rests his claim that the United States has made a normative commitment against torture on international treaty obligations, not on constitutional grounds. Indeed, it is unclear whether there is a constitutional ban on torture in all cases. The Eighth Amendment would not apply because most cases would not involve punishment. See *Kansas v. Hendricks*, 521 U.S. 346 (1997) (holding that a post-conviction civil commitment scheme for those likely to engage in sexually violent acts was not punitive and thus did not implicate the Eighth Amendment). Nor would the Due Process Clause ban all torture, but might permit it upon a showing of a compelling need.

67. Strict Kantians would argue that no exceptions should ever be tolerated, though the heavens fall. Others, such as Michael Walzer or Henry Shue, while against any formal exception to a ban on torture, recognize more realistically that some cases will occur and want torturers to bear the consequences, just like any other law-breaker. See Levinson, *supra* note 56, at 2032–36 (discussing views of Walzer and Shue).

have a different view of the merits of the question. This could mean a formal change in the law is then necessary, so that henceforth some exceptions to an absolute prohibition might be recognized. As long as there were no absolute constitutional ban on torture, and legal procedures for changing the law were followed, no Time 2 precommitment dilemma would arise. We would simply be revising a legal commitment in light of new facts and thinking.<sup>68</sup>

A true precommitment dilemma would arise if instead we acknowledge that there is a ban on torture, and rather than formally change the law, seek to find ways not to apply it. In such instances, tensions arise because those that apply the law are being unfaithful to their precommitment against all torture but are finding ways to avoid that precommitment. Even if, *ex ante*, one would now allow for that exception, it is still a violation of the precommitted nature of law to create an exception that has not been formally enacted. There are, of course, many techniques for reconciling the two, for example, finding that the definition is too narrow to apply to the case in question or finding that a criminal intent—or intent to violate the law, knowing that it was illegal—was absent.<sup>69</sup> Indeed, we rate judges and lawyers by their skill in showing that the law is respected and intact even though an exception to it is implicitly recognized. But recognizing unauthorized exceptions will entail reliance and certainty costs in other laws.

Other issues arise even if formal legal change to permit torture in limited circumstances occurs. If we change the law and recognize some exceptions or cases of justifiable torture, we risk weakening the rule against torture more generally by opening claims that other cases of torture are justified as well. The problem in recognizing an exception is how to do so without giving up too much of what we thought we were against in enacting the original prohibition. Opponents of such change often argue that such changes start society down a slippery slope to more extensive changes. Slippery slope arguments are very difficult to sustain, but they appeal to the fear that any exception to a moral norm might swallow it altogether.<sup>70</sup> Alan Dershowitz's idea of torture warrants issued by a neutral magistrate in a

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68. One such proposal would recognize narrow exceptions only when a torture warrant is issued by a neutral magistrate in a public hearing. See Levinson, *supra* note 56, at 2024 (discussing the “ticking bomb terrorist” argument proposed by Professor Alan Dershowitz). Such a procedural solution is itself a type of precommitment. A contested action is permitted, but only if we first surmount a series of hurdles that are intended to screen out unjustified deviations from a norm, as illustrated by the earlier discussion of review procedures for assisted suicide and abortion. See discussion *supra* Part IV.

69. As Levinson so skillfully shows, there are many ways of appearing to uphold the norm at Time 2 while softening its reach, thus appearing to honor the law and the norm it embodies while limiting it. For instance, Justice Hugo Black was able to maintain a view that the First Amendment is an absolute, while recognizing that many restrictions on speech do not fall within that prohibition. *Id.* at 2016.

70. For an interesting analysis of slippery slopes, see Eugene Volokh, *The Mechanisms of the Slippery Slopes*, 116 HARV. L. REV. 1026, 1026–39 (2003) (discussing methods of sensibly analyzing the merits of slippery slope arguments).

public hearing with the victim present illustrates the point.<sup>71</sup> Specifying narrow criteria for when torture is permitted would seem to limit it to a few meritorious cases. Yet the very fact of explicit legal authorization threatens broader approval. The issue is whether being open and visible is a more effective way for limiting its use than is banning it altogether, knowing that some implicit unregulated exceptions will occur. A precommitment perspective on law will not solve recurring problems of stability and change in law, but might focus analysis more sharply and show how change might be accommodated while maintaining fidelity to law.

### VIII. Symposium Papers

The papers in this Symposium elucidate many of the themes of precommitment behavior and its paradoxes described in this Introduction. It begins with an article by Jon Elster that deepens and elaborates further his seminal and always stimulating ideas about precommitment. Robert Frank then addresses commitment problems in rational choice. He shows that non-rational commitments are a central part of human activity and need to be incorporated into theorizing about precommitment.

Essays on precommitment issues in bioethics follow. Dan Brock, while discussing problems of advance consent to medical treatment, provides a lucid account of the basic precommitment dilemma and why the Time 1 self should ordinarily not be able to control the self at Time 2. Rebecca Dresser critiques advance directives that preclude medical treatment when a person later becomes incompetent. John Robertson provides an overview of precommitment issues in bioethics by analyzing their use in consenting to medical treatment, in human subjects research, and in reproductive settings. Richard Markovits analyzes the precommitment approach to advance directives for an incompetent person from the perspective of whether a rights-based society would recognize the Time 2 individual as a rights-bearing entity or indeed as the same person at all.

The final set of essays involve precommitment issues in constitutional and international law. Samuel Issacharoff discusses constitutions as setting forth the procedural rules for determining how political power is legitimately transferred in a society and shows how those precommitments played out in the voting rights aspects of *Bush v. Gore*. Sanford Levinson looks at legal precommitments against torture and shows the difficulties for maintaining substantive norms when new circumstances or views about the trade-offs involved arise. Richard Markovits's essay also explores norms against torture, showing that liberal rights-based societies provide no space for it. John Ferejohn and Lawrence Sager explore how constitutional lawmaking and amendment procedures serve as devices to constrain deviation from

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71. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 159–61 (2002).

normative commitments contained elsewhere in constitutions. William Forbath questions whether those devices serve more to prevent realization of rather than protection of substantive constitutional values. Finally, Steven Ratner shows how precommitment ideas apply to many aspects of international law and international relations.

The idea that one can bring together excellent thinkers from several different academic fields and expect them to have something to say to one another risks an overly romantic view of the academic enterprise. The essays in this Symposium may not show that the barriers to true interdisciplinarity have lifted, but they greatly deepen our knowledge and understanding of how precommitment devices function in law, bioethics, and constitutionalism. Future thinkers about precommitment issues will profit greatly from these efforts.