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Milton C. Regan
Georgetown University Law Center, regan@law.georgetown.edu

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Milton C. Regan
Professor of Law
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regan@law.georgetown.edu

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LAW, MARRIAGE, AND INTIMATE COMMITMENT

Milton C. Regan, Jr.*

INTRODUCTION

Does society have any interest in the stability of marriage per se—that is, apart from any concerns about the impact of divorce on children or financially dependent spouses? Should law try in any way to reinforce an ethic of commitment in marriage as a good in and of itself?

As an introductory illustration, consider the story of Alex and Caitlin. They meet when he is a twenty-seven-year-old engineer at a telecommunications start-up and she is an associate at a law firm. They fall in love. Alex feels that Caitlin helps him break through the emotional barriers that he constructed to deal with growing up as the oldest child in a household with an alcoholic father. Caitlin finds that Alex shares her strong political commitments, and that he is willing to drop everything and really listen to her when something is on her mind. They both believe in marriage as an expression of their mutual commitment, so they marry, promising to stay together until "death do us part."

Three years later, things do not seem so rosy. Alex derives great satisfaction from his work but finds that he cannot talk to Caitlin enough about it because she seems neither to understand it nor appreciate its importance. Indeed, she barely seems able to operate her computer for simple word-processing tasks. Furthermore, she displays little enthusiasm for his musings about launching his own company someday. Caitlin begins to worry that Alex possesses neither the sensitivity nor the sense of responsibility she had originally thought he had. She feels that he spends long hours at work, or in front of the

* Professor of Law, Georgetown University Law Center.
computer at home, engaged in activity that he takes no time to explain to her. He finds it difficult to make conversation with her colleagues at law firm functions, and recently simply stopped going to them. He talks about starting his own firm, apparently without any thought to how that might make it far more difficult to afford to have children any time soon.

Who became disenchanted first is unclear, as is whether one’s disaffection is a reaction to the other’s discontent, or whether either might stay in the marriage if the other one relented. In any event, each has come to believe that the best thing for them now might be to go their separate ways. They have comparable incomes and no children. Should we care whether they stay married? If they want to end their marriage, should they be able to do so just by sending a notice to the county clerk? Is their divorce simply their own business?

Society does have some interest in whether they remain married, and in the ease with which they can obtain a divorce. I want to explore why some resistance to this conclusion exists, and why such resistance is misguided. Two social trends make this a timely issue. First is the steady erosion of the link between marriage and procreation over the last generation. More married couples do not have children; more children are born outside of marriage. A second trend is the rise of unmarried cohabitation over the same period. This second development requires careful thought about whether law should continue to favor married over unmarried couples in the provision of many state benefits. Together, these two trends will soon force

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4 For an examination of this issue, see Milton C. Regan, Jr., Calibrated
us to confront whether marital stability in itself warrants social and legal attention. Put differently, is marital disruption a concern only insofar as it might disadvantage children or financially vulnerable spouses? Does marital stability carry importance for its own sake, or does it just serve as a proxy for other more fundamental values?

I. OF SPOUSES AND PARENTS

Elizabeth Scott recently described what seem to be inconsistent American attitudes toward marriage as a legal institution. On the one hand, "[m]ost people view lasting marriage as an important part of their life plans and take the commitment of marriage very seriously." On the other, "any legal initiative designed to reinforce that commitment generates controversy and is viewed with suspicion in many quarters."

This skepticism about law's role as a "norm manager" does not extend to all aspects of family life. The law has circumscribed parents' authority over their children for several decades, subjecting unfit parents to loss of custody for egregious violations of legal duties. More recent legal initiatives have sought to emphasize the ineluctable character of financial responsibilities for child support, creating significant penalties for those who fail to live up to these obligations. In contrast to some laws touching upon the relationship between spouses, these

Commitment: The Legal Treatment of Marriage and Cohabitation, 76 Notre Dame Law Rev. 1365.
6 Id. at 1902.
7 Id.
8 Id. at 1904; see also Cass Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903, 907 (1996).
measures generally have enjoyed relatively widespread support.\textsuperscript{11}

Why do the attitudes differ? Professor Scott suggests that using law to promote marital commitment generates resistance because of its historical interconnection with traditional gender norms.\textsuperscript{12} She suggests that the use of law to reinforce a norm of marital commitment may enjoy the greatest acceptance when its design promotes the welfare of children.\textsuperscript{13} Examples might include a longer waiting period for divorce for those couples with minor children than for those without; a more stringent standard of review for premarital contracts dealing with matters covering children; and lesser willingness, in calculating spousal maintenance obligations, to impute income to a spouse who is the custodian of minor children.

What about when no minor children are involved? Many still support the use of law as a marital norm manager, when doing so helps protect a financially vulnerable spouse.\textsuperscript{14} Efforts to impose responsibility in this instance have been less concerted than attempts to enforce and formulate guidelines for child support duties.\textsuperscript{15} Nonetheless, heightened attention has developed in recent years to the plight of those spouses, most often women, who have sacrificed their earning power during marriage and thereby are at risk of suffering significant financial disadvantage after divorce.\textsuperscript{16} The paradigmatic sympathetic

\textsuperscript{11} See Scott, supra note 5, at 1904.
\textsuperscript{12} Id. at 1962-63.
\textsuperscript{13} Id. at 1965.
\textsuperscript{14} See generally Milton C. Regan, Jr., Forward to Symposium, Divorce and Feminist Legal Theory, 82 Geo. L. J. 2122 (1994).
\textsuperscript{15} For instance, "every state now has adopted child support guidelines." Areen, supra note 9, at 812. On the other hand, "alimony remains a residual category, defined as those financial awards available in connection with the dissolution of a marriage that are not child support or the division of property." Principles of the Law of Family Dissolution: Analysis and Recommendations § 5.01, cmt. a (American Law Institute, Proposed Final Draft, Part I 1997).
\textsuperscript{16} See e.g. Allen M. Parkman, No-Fault Divorce: What Went Wrong?
case appears to be the wife in a long marriage, who has devoted most of her married life to domestic responsibilities, and whose husband seeks to divorce her at a time when his earning potential substantially exceeds hers. 17

This example suggests a broader category of cases in which use of the law to enforce a sense of marital responsibility may garner support: when marital disruption is likely to result in harm to those who are vulnerable. This category obviously includes divorces in marriages with children, but it also encompasses cases involving financially dependent spouses. None of this is meant to suggest that the law now consistently makes adequate provisions for those at serious risk from divorce. Indeed, we remain woefully short of this goal. In comparison with legal rules that aim to reinforce commitment between spouses per se, however, I would argue that legal reinforcement of norms intended to protect the vulnerable from the impact of divorce is seen as relatively legitimate. 18 These attitudes are consistent with a cornerstone of classical liberal theory: John Stuart Mill's harm principle, which stipulates that law should seek to impose otherwise-regarding norms only when necessary to prevent harm to others. 19

The harm principle, however, does not apply readily to Alex and Caitlin, who have comparable financial resources and no children. Should we care if they remain committed to one another? Even if they did have children, and if Alex had a much higher income than Caitlin, suppose we could effectively mitigate the impact of their divorce on the children and on Caitlin. Would there be any reason then to care about their divorce? These scenarios


18 Hence, the widespread condemnation of “deadbeat dads.”

place in sharp contrast a basic question: does society have an interest in marital commitment *per se*, or only insofar as its role serves as a vehicle for ensuring financial and emotional security for children and economic stability for adults?

Many people probably would say that law should not try to reinforce a norm of marital commitment, except to protect children or an economically vulnerable spouse. Professor Scott asserts that much of the resistance to using law to promote an ethos of marital commitment *per se* stems from the fact that such commitment traditionally has been gender-coded. Norms of spousal selflessness and personal sacrifice have been regarded as hallmarks of wifely conduct, expressed concisely in Virginia Woolf’s description:

> She was intensely sympathetic. She was immensely charming. She was utterly unselfish. She excelled in the difficult arts of family life. She sacrificed herself daily. If there was chicken, she took the leg; if there was a draught she sat in it—in short she was so constituted that she never had a mind or a wish of her own, but preferred to sympathize always with the minds and wishes of theirs.

Those who seek equality between men and women not unsurprisingly may fear that what underlies appeals for greater marital commitment and sacrifice is a desire to return to the traditional expectation that women avoid thinking of their own interests. Critics point out that the

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20 Scott, supra note 5, at 1961-64.
need for women to find a suitable balance between work and family almost always characterizes discussions of the need for parents to curtail careers for the sake of children.\textsuperscript{23} In the same vein, some who work with battered wives suggest that only recently have many women mustered the courage to leave or resist abusive husbands, in part because of self-sacrificing attitudes.\textsuperscript{24}

There may, however, be an additional explanation for resisting legal promotion of marital commitment. This is that the powerful companionate model of marriage that dominates our era regards marital intimacy as a commitment flowing from the deepest wellsprings of the authentic self. On this view, intimate commitment is an irreducibly individual act that must remain untainted by the coercive power of the state. Any effort to use law to reinforce such commitment necessarily deprives it of its meaning and legitimacy. This sensibility asserts the sovereignty of individuals in determining the terms of their intimate relationships. It sees law’s role ideally as confined to the provision of a mechanism to enforce individual agreements between consenting adults, rather than the imposition of specific rights and duties applicable to all who are married. In short, it regards contract, rather than status, as the fundamental paradigm of marriage.\textsuperscript{25} Anthony Giddens notes the analogy of this view to classical notions of liberalism. He suggests that it represents the idea of “intimacy as democracy,” according to which obligation

\textsuperscript{23} This reflects what Joan Williams has called the ideology of “domesticity.” Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 1-4 (2000).


\textsuperscript{25} On the movement from status to contract in family law, see Milton C. Regan, Jr., Family Law and the Pursuit of Intimacy 35-42 (1993).
depends on the ongoing ability of individuals to determine the conditions of their associations.\textsuperscript{26}

A defense of using law to promote marital commitment can square with these premises. As Professor Scott argues, short-term pressures can thwart deep individual desires for long-term commitment.\textsuperscript{27} Law can enhance the ability of individuals to resist these influences and attain their long-term goals by shaping the payoff matrices for different types of behavior.\textsuperscript{28} This approach takes individual preferences as a given, asserting that people have preferences for long-term commitment, and that the state should help them realize those preferences. On this view, legal reinforcement of commitment norms in marriage is consistent with respect for individual autonomy in intimate matters. The state maintains neutrality about the value of commitment, and confines itself to helping those who want to attain it.

Is the state justified in going beyond neutrality? Should it promote intimate commitment as a substantive goal worthy of pursuit because of its contribution to human flourishing? Because such commitment is in fact a crucial activity in realizing the liberal ideal of authentic self-realization, I argue that it should. However, even if the state is justified in seeking to further this good, is privileging marital commitment justified as a means of doing so? It is, I contend, because marriage provides a distinct social form that expresses intimate commitment as an impersonal good, whose value transcends the mere fact that it is personally chosen. Impersonal legal status thus can enhance the ability to realize personal intimacy. The state therefore may reasonably attempt to encourage intimate commitment as a valuable human good. My argument is not that self-realization is the only, or even the most

\textsuperscript{26} Anthony Giddens, Modernity and Self-Identity: Self and Society in the Late Modern Age 89 (Polity Press 1991).

\textsuperscript{27} Scott, supra note 5, at 1908-09, 1911; see also Elizabeth S. Scott, Rational Decisionmaking About Marriage and Divorce, 76 Va. L. Rev. 9, 12, 38-39 (1990).

\textsuperscript{28} See generally Scott, supra note 27.
important, value furthered by marital commitment. Rather, my claim is that respect for individual autonomy does not preclude efforts to use law to reinforce such commitment.

II. INTIMACY AND AUTHENTICITY

This section begins with a powerful and fundamental norm of modern liberal society: the importance of individual authenticity. This notion involves at least three concepts. The first is the importance of self-fidelity—remaining true to one’s own uniqueness. Each person has her own distinct potential that warrants development. Indeed, Kant suggested that every individual has a moral duty to develop herself as fully as possible. As Charles Taylor put it, “Being true to myself means being true to my own originality, and that is something only I can articulate and discover. In articulating it, I am also defining myself. I am realizing a potentiality that is properly my own.” In this way, “being in touch [with our inner voice] takes on independent and crucial moral significance. It comes to be something we have to attain to be true and full human beings.”

A second concept is autonomy, which is regarded as an especially important value of modern Western life. Voluminous writing on this subject has evolved, which has explored its varying refinements, not all of which are

30 See Marcia Baron, Kantian Ethics, in Marcia W. Baron et al., Three Methods of Ethics: A Debate 15-16, 19 (1997).
31 Taylor, supra note 29, at 29.
32 Id. at 26.
consistent with one another. For the purposes of this article, autonomy should be defined to mean at its core the idea that human beings can be self-governing individuals. On this view, "I am free when I decide for myself what concerns me, rather than being shaped by external influences." The relationship of this ideal to self-fidelity should be apparent. One fulfills her unique individual potential when her own understanding of that potential and what will help realize it govern her life. My choices have autonomy to the extent that they rest on this foundation rather than on the wishes and expectations of others.

Finally, individual authenticity involves personal integrity. Lynne McFall illustrates the concept of integrity in discussing Tolstoy's story "The Death of Ivan Ilyich." Tolstoy describes Ilyich's ruminations on his deathbed:

"It occurred to him that what had appeared perfectly impossible before, namely that he had not spent his life as he should have done, might after all be true. It occurred to him that his scarcely perceptible attempts to struggle against what was considered good by the most highly placed people, those scarcely noticeable impulses which he had immediately suppressed, might have been the real thing, and all the rest false." McFall suggests that Ilyich's relations to the standards by which he had lived his life were: "...inauthentic. He simply bought 'his' principles wholesale from those around [him]. A merely conventional relation to one's principles seems to

34 For an account of the evolution of autonomy as a core Western concern, see generally J.B. Schneewind, The Invention of Autonomy: A History of Modern Moral Philosophy (1998).
35 Taylor, supra note 29, at 27.
36 Lynne McFall, Integrity, 98 Ethics 5, 6 (1987-88) (quoting Leo Tolstoy, "The Death of Ivan Ilyich," in The Short Novels of Tolstoy (Aylmer Maude, trans., 1946)).
rule out personal integrity. One must speak 'in the first person,' make one’s principles, conventional or otherwise, one’s own." 37

To "make one’s... principles one’s own" requires that those principles guide a person even when they are inconvenient or unpopular. Integrity thus requires a measure of consistency. First, one’s values must have sufficient consistency so one can live life without values that she regards as fundamental frequently pulling her in different directions. Second, a person’s conduct must generally square with her values. If not, then she does not genuinely live her life according to her own lights.

McFall suggests that integrity has both formal and substantive conditions. As a formal matter, it requires that a person "(1) subscribe to some consistent set of principles or commitments and (2), in the face of temptation or challenge, (3) uphold these principles or commitments, (4) for what the agent takes to be the right reasons." 38 As a substantive matter, it requires that one’s commitments relate to something that we regard as of significant value. 39 Thus, we generally would not say that a wine connoisseur demonstrated great integrity in declining to consume a soft drink instead of a fine wine with an elaborate dinner. As McFall notes, "Resisting temptation is not the only test of integrity; the challenge must be to something important." 40

Integrity bears a close relationship to self-fidelity and autonomy. A person who seeks to be true to herself values integrity because it helps her resist courses of action that do not reflect her own deep sense of what will further her authentic growth and development. An autonomous person seeks to live with integrity because it enables her to harmonize her values into principles of self-governance.

Authentication and the set of ideals that cluster around it clearly require a sense of the continuity and stability of

37 Id.
38 Id. at 9.
39 Id. at 9-11.
40 Id. at 10 (emphasis included).
the self over time. The notion that a person must remain true to herself, for instance, assumes that she has a self that is distinct from any other, a self capable of charting a trajectory that permits it to realize its unique potential. Ways of realizing this potential may vary in different situations. The standard by which alternatives are evaluated, however, is drawn not from the exigencies of the moment, but from a more stable understanding of the self, whose imperative may conflict with the allure of any particular course of action. Without such stability, no self would exist to which one could be true. Nor is a person autonomous if she is simply the plaything of circumstance, buffeted about by the vicissitudes and impulses of each moment. Such a “radically situated” self is not self-governing; “external” influences over which she exerts no control, rather than her “internal” compass, shape the course of her life.

Finally, integrity demands that a person give “deliberative priority” to certain principles and commitments. As Bernard Williams elaborates, “A consideration has high deliberate priority for us if we give it heavy weighting against other considerations in our deliberations. (This includes two ideas; that when it occurs in our deliberations, it outweighs most other considerations, and also that it occurs in our deliberations).” This standard requires the sense that there are some things that a person will not do, regardless of their appeal in the immediate context, because those things are inconsistent with an overarching sense of who she is.

Without this relatively stable sense of self, no criteria would exist with which to evaluate the possibilities of each passing moment. As Lynne McFall puts it, “there

41 Michael J. Sandel, Liberalism and the Limits of Justice 21 (1982).
44 McFall, supra note 36, at 13-14.
would be nothing to fear the loss of, not because we are safe but because we have nothing to lose.”

Self-fidelity, autonomy, and integrity thus contribute to the notion that the individual is the protagonist in a narrative that gives a sense of direction and purpose to what would otherwise be discrete random events. The ability to make and keep commitments is critical to the unity of the self over time. A commitment represents the deliberate narrowing of future courses of action for the sake of a value regarded as integral to the kind of person one is. By freely accepting certain constraints on the possibilities open to her, a person expresses who she is. A person does not simply have commitments. Rather, commitments help constitute the unique person she is.

In this sense, core commitments are, as McFall suggests, “identity-conferring.” They “reflect what we take to be most important and so determine, to a large extent, our (moral) identities.” This definition does not of course mean that we are incapable of violating our commitments. It does, however, mean that “[t]here are things we could not do without self-betrayal and personal disintegration.” Furthermore, we may change our core commitments over time in light of experience. Both the psychological tumult that often accompanies such changes, as well as the common statement that one was “a different person” when other commitments weighed more heavily, reflect, however, the integral part that such commitments play in our self-conception. Commitments thus create a paradox: they represent constraints on behavior that act as the prerequisites for personal freedom. They become

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45 Id. at 20.
46 See Blustein, supra note 42, at 231 (stating that core commitments of persons “are not merely externally related to their self-conceptions. They are constituents of their identities…”).
47 McFall, supra note 36, at 13.
48 Id. (footnote omitted).
49 Id.
“premises of our agency”\textsuperscript{50} in that they make possible the sense of identity that enables us to navigate experience with a sense of purpose and meaning.

Among our most profound commitments are those to other people. In particular, romantic personal intimacy, at least in contemporary Western society, engages identity in an unparalleled way.\textsuperscript{51} The romantic ethos envisages that individuals in an intimate relationship reveal their deepest fears, hopes, and dreams in a process of mutual validation. This confirmation produces in each person the sense that “I am loved for who I am”—that one’s unique and authentic self is worthy and valuable. As Jeffrey Blustein suggests, “Personal love attaches to the particular way in which a person instantiates the possibilities of being unique and irreplaceable.”\textsuperscript{52} Intimacy does not simply validate a pre-existing self; it also prompts discovery of parts of the self of which one previously may not have had awareness. Romantic love

presumes a psychic communication, a meeting of souls which is reparative in character. The other, by being who he or she is, answers a lack which the individual does not even necessarily recognise—until the love relation is initiated. And this lack is directly to do with self-identity: in some sense, the flawed individual is made whole.\textsuperscript{53}

The romantic quest expresses this relationship between identity and narrative: it is “an odyssey, in which self-

\textsuperscript{50} Blustein, supra note 42, at 231.
\textsuperscript{52} Blustein, supra note 42, at 194.
identity awaits its validation from the discovery of the other."54

By virtue of this perceived role in illuminating the deepest levels of authenticity, intimate commitment enjoys privileged status among the various types of commitments that we may make. "The hope for permanent oneness is at the heart of romantic love. Though romantic lovers know that all emotions are inconstant... they seek a relationship that will continue endlessly."55 Maintaining such commitment thus plays an especially important role in fashioning and sustaining a sense of the stability of the self over time. For this reason, commitment in general, and intimate commitment in particular, is integral to the ability of the self to sustain a sense of its own authenticity. Commitment serves as a filter for experience that enables an individual to assess the meaning and relative importance of alternative courses of action, in terms of their consistency with those values she regards as central to her identity. It allows her to link otherwise successive discrete moments into a narrative in which she is the protagonist. Commitment reflects the aspirations of the authentic self: there does exist a coherent self to which one can be true. This self can realize autonomy rather than merely acting as a product of contingent circumstances, and can live with integrity by harmonizing its values with one another and with the exigencies of daily life.

In short, commitment is a good that society should actively promote because of its essential role in realizing the deeply-rooted aspiration that individuals lead lives that they can call their own. Ironically, however, recognition of the close connection between commitment and authenticity likely accounts for much of the resistance to using law to reinforce norms of intimate commitment. The argument is that, in order to be genuine, commitment must reflect the deepest emotions of a self who is free from any "external"

54 Id. (noting romantic love "provides for a long-term life trajectory, oriented to an anticipated yet malleable future; and it creates a shared history").
social pressure. This argument reflects the evolution of intimacy toward what Anthony Giddens describes as the "pure relationship." This relationship "is entered into for its own sake, for what can be derived by each person from a sustained association with another; and which is continued only in so far as it is thought by both parties to deliver enough satisfactions for each individual to stay within it." The result is the strong conviction that legal duties that apply regardless of personal sentiment are the antithesis of authentic personal commitment.

The problem with this view of the relationship between law and intimacy is its asocial view of identity. It rests on the ostensible contrast between a natural realm of personal emotion and an artificial realm of law and collective values. In this dichotomy, the first is the domain of the authentic; the second of the coercive and inauthentic. As the preeminent formal expression of society's demands, law necessarily taints any intimate behavior that it influences.

This perspective ignores, however, the ways in which the social world shapes individual preferences and sentiments, as well as self-understanding. Individuals do not formulate their sense of meaning and value in isolation. Instead, they operate within a cultural "background of intelligibility." Language, art, myth, and other cultural expressions all help to constitute this background. Thus, the absence of legal rules does not mean there will be no collective influences on intimate aspirations and experience. It simply means that non-legal norms and values that the larger culture transmits will have a more prominent impact on individual emotional life. As the next section elaborates, these influences may make the practice of commitment increasingly more fragile.

56 See Regan, supra note 25, at 46-56.
57 Giddens, supra note 53, at 58.
58 Id.
59 Taylor, supra note 29, at 37.
III. COMMITMENT AND MODERN CULTURE

Contemporary Western culture is not monolithic. It contains a multitude of voices and attitudes, some consistent, some in conflict. Nonetheless, certain features of modern culture, in combination, tend to make it more difficult to sustain a stable sense of self over time. In subtle ways, these social influences make commitment more tenuous and the construction of a coherent personal narrative more problematic. These influences are: (1) a sense of “time-space compression” with accelerating changes in communications technology,60 (2) the ethos of mass consumer society; and (3) the ascendance of flexible production methods that introduce more risk and impermanence in workplace relationships. Each of these forces in its own way threatens to heighten a sense of the self as fragmented, because each has the potential to undermine the foundations on which individual commitment must rest. A legal system that eschews any role for law in reinforcing commitment risks leaving individuals to their mercy.

A. Time-Space Compression

“Time-space compression” refers to the dramatic increases in the individual’s exposure to stimulation by others across time and space.61 Technology such as electronic mail, voice mail, fax machines, cell phones, and the Internet enhances the possibility of being “present” in more than one place at a time while simultaneously engaging in multiple activities. Rapidly shifting images in entertainment and commercials move us quickly from one set of emotions to another with little time to digest and reflect upon them. Reality television, talk shows, and personal web sites break down a sense of private space, making the intimate details of individuals’ lives vicariously accessible to millions. The result, as Kenneth Gergen

61 Id.
observes, is that “the number and variety of relationships in which we are engaged, potential frequency of contact, expressed intensity of relationship, and endurance through time are all steadily increasing.”62 With this increase in exposure to others comes a multiplication in the possible dimensions of the self that may be evoked in any given instance. In Gergen’s term, we become “populated” with the voices and perspectives of others.63 The accelerated pace of contemporary life often moves us from one context to another, so that a person confronts voices from a number of different contexts in rapid succession. The incessant demands of these voices will not necessarily be consistent; indeed they may well conflict. Each may present an intense claim on one’s allegiance at any given moment, but that allegiance is subject to attenuation when the claim of a new voice arrives. A simple example involves a father wishing to spend unstructured time with his children, so that his identity as a parent is the most salient guide to his actions. An email from work that flashes on the screen where he is playing a computer game with his children, however, may demand that his professional identity come to the forefront.

This increase in our accessibility to an expanding range of others can create difficulty in sustaining a sense of personal continuity in one’s life as a whole. Individuals may lack time or space to digest the flow of events and fit them into an overarching narrative; they may lack opportunity to do more than respond to each voice on its own insistent terms. The predominant experience may be “the absolute proximity, the total instantaneity of things, the feeling of no defense, no retreat.”64 In this world, “I no longer succeed in knowing what I want, the space is so saturated, the pressure so great from all who want to make themselves heard.”65 As a result, a “multiphrenic”

63 Id. at 74.
65 Id. at 132.
personality may emerge, reflecting fragmentation of the self into a variety of discrete allegiances, no one of which has any priority over the other.\(^{66}\)

Under these conditions, the notion of an authentic self becomes problematic. That ideal assumes the individual’s capability to evaluate the demands of the moment in light of a relatively stable set of values that define her identity. Those values are expressed in commitments, which provide some evaluative distance from the demands of the immediate present. Achieving that distance has become more difficult, however, in a world of seemingly incessant stimulation. “[A]s new and disparate voices are added to one’s being, committed identity becomes an increasingly arduous achievement.”\(^{67}\) Self-fidelity may be tenuous—to which “self” must one be true? Autonomy is problematic, because immediate circumstances, rather than an internal compass, seem to dictate how the self reacts to each situation. Finally, it is difficult to act with integrity because there seems to be no standard by which to harmonize either multiple voices or one’s own beliefs and actions.

**B. Consumerism**

A second feature of modern life that may undermine a stable sense of the self and its commitments is the prevalence of mass consumer society. The ethos of capitalism as portrayed by Max Weber was an emphasis on those character traits conducive to the efficient operation of the production process: self-restraint, frugality, the renunciation of impulse, and the fulfillment of duty.\(^{68}\) Such attributes had value in the formation of a stable personal character that would allow the individual to succeed in a world of large-scale entities organized on the basis of rational economic principles. Predictable commitments that

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\(^{66}\) Gergen, supra note 62, at 73-74.

\(^{67}\) Id. at 73.

provided a relatively stable filter for experience, and a fairly predictable life trajectory, in large measure constituted that character.

As Daniel Bell has observed, mass consumerism has undermined the salience and attractiveness of those character traits. The stimulation of consumer demand, especially with the advent of widespread credit, required overcoming inhibitions on hedonism and responsiveness to impulse. It has required that individuals become more receptive to—and indeed crave—change and novelty. Mass consumption thus generated acceptance of constant “social change and personal transformation.” Such qualities are crucial if economic overproduction is not to become a critical problem. Bell reflects the current “disutility” of Weber’s Protestant ethic in his observation that “[t]he one thing that would utterly destroy the new capitalism is the serious practice of deferred gratification.”

The result of this development is that the images, metaphors, and self-understandings of the consumer experience have become more pervasive and salient ways of organizing personal identity. Primarily through the efforts of advertising, the public tends to interpret personal needs as needs for commodities, equating autonomy with consumer choice, and self-fulfillment with consumption. Note, for instance, the credit card commercial that itemizes the cost of the commodities purchased in order to obtain a “priceless” experience. As Michael Schudson has observed, “no other cultural form is as accessible to children; no other form confronts visitors and immigrants to our society (and migrants from one part of society to another) so forcefully.” Schudson draws an analogy between consumer advertising and the prevalence of religious imagery in the French countryside in the nineteenth century.

70 Id. at 66.
71 Id. at 78.
century. While the pervasiveness of this imagery did not mean that the average French peasant necessarily was a devout Christian, it did mean that "[w]hen one thought of salvation or, more modestly, searched for meanings for making sense of life, there was primarily the materials of the Church to work with."\textsuperscript{73}

The significance of the increasing currency of self-definition as a consumer transcends whatever materialism it may inspire. Dissatisfaction and restlessness that pose a threat to sustaining commitment subtly characterize the phenomenology of the modern consumer experience. First, the expectation of constant novelty leads the consumer to regard her choices as provisional and impermanent. Clothing fashion most notably illustrates this phenomenon, but it also exists with respect to items such as automobiles, computers, and entertainment systems. The discovery of needs that she did not know she had regularly encourages her to abandon her past purchases for something new. As a result, "[t]he consumption pattern of the moment is conceived of not as part of a way of life, but only as a temporary adjustment to circumstances. We expect to take the first available chance to change the pattern."\textsuperscript{74}

The modern consumer therefore exists in a milieu of qualified commitment. Indeed, longevity and commitment themselves become nostalgic commodities. Pre-faded and pre-frayed pants, shirts, and hats, for instance, all offer the consumer immediately upon purchase an opportunity to convey the image that she wears familiar well-worn clothing that has been with her through life's vicissitudes.

A second salient feature of the consumer experience is that it is characterized more by wanting than having.\textsuperscript{75} Consumption often seems to provide only temporary satisfaction, then disappointment, and then longing for other goods or experiences. This is, of course, partly a

\textsuperscript{73} Id. at 230.
\textsuperscript{74} James S. Duesenberry, Income, Saving, and the Theory of Consumer Behavior 26 (1967).
function of the ethos of novelty. It is also, however, based on the nature of the relationship between the modern consumer and the products that she consumes. Contemporary advertising generally does not aim principally to provide information to the consumer so she can make a rational choice. Rather, it attempts to create a diffuse aura around a product through association with certain symbols. The “images and symbolic meanings are as much a ‘real’ part of the product as its constituent ingredients.” Advertising creates a relationship between consumer and product whereby floating, detached images tend to dominate more than symbols with specific referents. Modern consumers increasingly inhabit a world defined by its own subjectivity—a world made up not of objects with definite attributes, but one composed of the dreams and desires that they project onto those objects.

Colin Campbell draws on this dynamic to suggest that modern consumers are often caught in a cycle of desire, disappointment, and rekindled desire, in which the predominant mood is one of longing. The ambiguity of advertising, which encourages the consumer to “attach his favoured day dream to this real object of desire,” fuels the desire for a commercial product. The act of consumption, however, often fails to live up to these fantasies. The condensed and highly charged emotions of advertising create a standard of personal experience that everyday life can only poorly approximate. Desire is rekindled, however, as the individual projects her fantasies upon some new and different product. As Campbell describes this cycle: “[T]he modern hedonist is constantly withdrawing from reality as fast as he encounters it, ever casting his day-dreams forward in time, attaching them to objects of desire, and then subsequently ‘unhooking’ them from these objects as and when they are attained and experienced.”

77 See generally id.
78 Id. at 86.
79 Id. at 86-87.
To the extent that individual identity is tied to the consumption of objects subject to such a process, the instability of that identity threatens to make self-fidelity an incoherent concept. Furthermore, the compulsive nature of such a cycle thwarts efforts at autonomous self-governance. Finally, the ephemeral character of consumer commitments erodes a sense of integrity, by depriving the individual of a basis for reconciling values and behavior. As such, modern consumerism has the potential to hinder attainment of the ideal of authentic self-realization.

C. Flexible Production

A third feature of contemporary life that may weaken commitment and personal stability involves the greater influence of a “flexible production” model in organizing work life. This model has begun to erode the organizational preconditions for the virtues of formal obligation, self-restraint, and commitment that were integral to the formation of the character type that Weber’s Protestant ethic exemplified. By current standards, at least, the older mass production model organized the workplace in terms of a relatively fixed production process, standard work roles, and seniority-based advancement, all of which lent a certain predictability to employment. Work life generally consisted of gradual advancement through the ranks of a single organization. Such a system made it possible for the individual to organize experience in terms of a linear narrative, in which the future built recognizably on the past. This made commitment and deferred gratification a coherent strategy, since organizational routine provided some protection against abrupt upheavals that could render past sacrifice meaningless.

81 Sennett, supra note 80, at 16.
82 Id. at 43.
Increasing reliance on flexible production has undermined the material bases for these character traits. Such production is designed to respond rapidly to volatile changes in consumer demand, seeking to minimize both permanence and routine in favor of shifting work arrangements that can quickly respond to a new business environment. Richard Sennett suggests two notably important features of this production model: (1) the discontinuous reinvention of institutions and (2) flexible specialization. 83

Discontinuous reorganization involves reliance on loose networks of workers rather than on pyramidal hierarchies, with the ability to create and dissolve teams focused on short-term tasks. 84 From the worker's standpoint, work becomes oriented toward projects instead of a particular job with a well-defined location in the organizational structure. As Sennett observes, "The system is fragmented; therein lies the opportunity for intervening. Its very incoherence invites your revisions." 85 Flexible specialization reflects the use of technology to change the "weekly and sometimes the daily tasks workers are asked to do" in response to changes in market demand. 86 Modern communications make global market data instantly available, computers make it possible to reconfigure and reprogram industrial machines, and small work groups are positioned for quick decision-making. Such measures demonstrate a "willingness to let the shifting demands of the outside world determine the inside structure of institutions." 87 In such a regime, workers are less able to build complex skills by incrementally adding to simpler ones, but often must "retool" to take on more discontinuous tasks.

The traits that are functional and rewarded in a workplace organized along these lines conflict somewhat

83 Id. at 47.
84 Id.
85 Id. at 48.
86 Id. at 52.
87 Id.
with the ability to construct a coherent self-narrative through the process of making and keeping commitments. Sennett suggests that the core admonition of flexible production is “no long term.” Persons in this environment find detachment and superficial cooperation with temporary working groups more useful than permanent loyalty to any particular colleague or organization. One must have the capacity to let go of the past with relative ease, in order to be able to adapt to the next project and the unique configuration of skills and personnel that it requires. Deferred gratification loses much of its appeal in an organizational milieu in which there may be no predictable path of advancement, and where there is minimal acquisition of skills in a steady and cumulative progression. Indeed, “[t]he modern culture of risk is peculiar in that failure to move is taken as a sign of failure, stability seeming almost a living death.”

Such an environment contributes to a discontinuous experience of time, which threatens the sense that work and career proceed in linear fashion. With more individualized and fluid employment patterns, as well as more volatile organizational histories, the past may seem to have only tenuous connection to the future. With fewer clearly demarcated lines of career progression and an increase in loose organizational networks, occupational mobility “is often an illegible process” characterized by “ambiguously lateral moves,” making it difficult to know if one has moved up, down, or simply sideways. “Since people who risk making moves in flexible organizations often have little hard information about what a new position will entail, they realize only in retrospect they’ve made bad decisions.” This subjection to increased risk and disjointed time lacks the cumulative quality of a narrative,

88 Id. at 22.
89 Id. at 87.
90 Id. at 86.
91 Id. at 85.
92 Id.
93 Id. at 25.
sometimes thwarting the maintenance of a self who seems a stable agent charting a coherent path through recognizable territory. The organization of work around temporary teams "is flexible and oriented to specific, short-term tasks, rather than the reckoning of decades marked by withholding and waiting." 94

To the extent that career is a significant element of one's identity, the rapid redefinition of work that characterizes flexible production may make it difficult to sustain a self to whom fidelity can be pledged. New modes of production may seem to enhance autonomy by putting the worker more directly in charge of her work and career. As Sennett notes, however, flexible production provides distant managers unprecedented control over all aspects of the work process, and permits radical reconfiguration of organizations on short notice. 95 Mergers, downsizing, and reengineering can all threaten a worker's sense that she has any autonomy or mastery over the forces that shape her career. Finally, pressure for immediate results and attenuated institutional loyalty may complicate the harmonization of long- and short-term perspectives on which personal integrity relies.

D. Summary

In summary, several forces in contemporary life contribute to a sense of impermanence and discontinuity in everyday experience, creating a world in which the present seems vivid, insistent, and unconnected to either past or future. The fragmentation of such a world makes sustaining commitment and stable identity difficult. Art forms and cultural commentary designed to convey skepticism about the very coherence of the concept of an authentic self reflect this sense of self-fragmentation. 96 Frederic Jameson,

94 Id. at 106.
95 Id. at 55-57.
96 See generally Michel Foucault, The Order of Things: An Archaeology of the Human Sciences (1970); see also Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge (Geoff
for instance, suggests that the metaphor of schizophrenia may be emerging as an apt account of contemporary experience. The schizophrenic, he observes, is “given over to an undifferentiated vision of the world in the present,” in which the various moments of his or her past have little connection and in which “there is no conceivable future on the horizon.”\(^97\) For those with a sense of relatively distinct identity, the present “is always part of some larger set of projects which force [one] selectively to focus [one’s] perceptions.”\(^98\) By contrast, the schizophrenic “is not only ‘no one’ in the sense of having no personal identity; he or she also does nothing, since to have a project means to be able to commit oneself to a certain continuity over time.”\(^99\) In the same vein, Lawrence Grossberg regards Music Television (MTV) as the paradigmatic postmodern art form. MTV, he argues, refuses to take anything seriously, including itself. This indifferent expression reflects a stance of “authentic inauthenticity,” which is the view that “[i]f every identity is equally fake, a pose that one takes on, then authentic inauthenticity celebrates the possibilities of poses without denying that that is all they are.”\(^100\) One must, of course, allow for a certain fanciful hyperbole among academics that pronounce the advent of postmodernism. Even so, the important point is that technology, mass consumerism, and flexible production are all changing everyday experience in ways that make such descriptions more resonant than ever before.

\(^97\) Jameson, supra note 96, at 119.
\(^98\) Id.
\(^99\) Id. at 119-20.
\(^100\) Lawrence Grossberg, MTV: Swinging on the (Postmodern) Star, in Cultural Politics in Contemporary America 254, 265 (Ian Angus & Sut Jhally eds., 1989).
IV. WHY MARITAL COMMITMENT?

I began with the question whether, leaving aside solicitude for children and financially vulnerable spouses, the law should concern itself with commitment between spouses per se. I have argued that commitment is a substantive good that promotes human flourishing because it plays an integral role in realizing the ideal of individual self-realization. Intimate commitment is especially critical in this process because it can validate in deep ways the sense of one's worth as a unique person. Recent social developments, however, hamper the ability to sustain commitment and the viability of self-understanding in terms of relatively continuous identity. The fragmentation of experience in modern life can threaten the construction of personal narrative, and thus the coherence of an ideal of individual authenticity. As a result, rejecting any role for law in promoting intimate commitment risks strengthening by default the influence of these cultural forces.

Even if this argument makes the case for promoting intimate commitment through law, does it justify privileging one particular form of such commitment, i.e., marriage? Why make marital status a condition for enjoyment of a host of benefits?\footnote{For a catalogue of some of these benefits, see David L. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447, 452-85 (1996); Baker v. State, 744 A.2d 864, 883-85 (Vt. 1999).} The possible forms of intimate commitment comprise a broad range of relationships. Why not encourage commitment by providing full benefits and protecting individuals in all such relationships, not just marriage?

These questions reflect the notion that the ability to choose the terms of intimate relationships gives such relationships their deepest value to the individuals within them. On this view, genuine intimate commitment involves not assuming an impersonal legal status upon entering a traditional social institution, but bestowing meaning upon one's relationship with another through the exercise of
sustained choice. This perspective reflects the more general modern idea that "our 'values' are our creations, that they ultimately repose on our espousing them." 102 It implies that law can reinforce authentic commitment only by ratifying the intimate choices that individuals make, not by holding up one particular form of commitment as the ideal.

In order for choices to matter, however, the individual must choose among courses of action or states of affairs that have independent importance. Choice *per se* does not bestow value upon alternatives, nor does it play any role in constructing an authentic identity. Rather, individuals must choose against the backdrop of a "horizon" of significance that delineates what society deems valuable. 103 These values are diverse and sometimes incommensurable, and a person's choices among them have implications for her identity because they reflect her own distinctive evaluation, ordering, and attempted reconciliation of them. Making difficult choices shapes character because it represents confrontation with the pull of obligations whose force we cannot control solely by ourselves. By contrast, a person for whom things assumed value simply by virtue of her own fiat could always dissolve any dilemma merely by proclaiming that one of the alternatives no longer possesses any significance. As Charles Taylor maintains:

Self-choice as an ideal makes sense only because some *issues* are more significant than others. I couldn't claim to be a self-chooser, and deploy a whole Nietzschean vocabulary of self-making, just because I choose steak and fries over poutine for lunch. Which issues are significant, *I* do not determine. If I did, no issue would be

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103 Taylor, supra note 29, at 37.
significant. But then the very ideal of self-choosing as a moral ideal would be impossible.\textsuperscript{104}

Taylor illustrates the limitations of treating individual choice as the source of value in his analysis of a Jean-Paul Sartre example meant to demonstrate the irreducible significance of choice. Sartre presents the dilemma of a young Frenchman during World War II who is torn between remaining with his ill mother or joining the Resistance to fight the Nazis. Sartre maintains that whatever choice the young man makes lies beyond moral criticism; the course of action he follows has value simply because he has chosen it. The man settles the matter only by a "radical choice" that expresses and helps constitute who he is.\textsuperscript{105}

Taylor argues that the young man feels within the grip of a moral dilemma because there is a relative consensus that each of the claims that he confronts exerts a genuine moral pull—that they each stand for something that human beings regard as valuable.

On one hand his ailing mother who may well die if he leaves her, and die in the most terrible sorrow, not even sure that her son still lives; on the other side the call of his country, conquered and laid waste by the enemy, and not only his country, for this enemy is destroying the very foundation of civilized and ethical relations between men.\textsuperscript{106}

The man would not feel pulled in two different directions—regard himself as facing an agonizing dilemma—if there

\textsuperscript{104} Id. at 39; see also McFall, supra note 36 (when we regard a person as having integrity, her principles or commitments must be taken to be those that a reasonable person would regard as of great importance).

\textsuperscript{105} Taylor, supra note 102, at 290.

\textsuperscript{106} Id.
were not this widespread sense that each alternative has an intrinsic value that is independent of the fact that he may say that it is important. The conviction that what one cares about has impersonal value—that its genuine worth and importance as an object of human concern will endure long after one is gone—must therefore sustain personal value.\footnote{See Blustein, supra note 42, at 42-60.}

As Stephen Darwall puts it, “[t]hat which endows our life with meaning must be something whose value we regard as self-transcendent.”\footnote{Stephen L. Darwall, Impartial Reason 165 (1983).}

For intimate commitment to constitute identity, it must therefore present an image of something that derives its value from a source outside the self’s choice to engage in it. It requires, in other words, social validation. The legal institution of marriage plays an especially significant role in providing such validation for the value of commitment, bestowing a formal legal status on partners is a basis for impersonal rights and obligations. Those who marry participate in a public ritual that marks entry into a social institution intended to embody the value of intimate commitment. That institution transcends any specific couple who may be a part of it and has a history that dwarfs any couple’s particular experience. It offers a reasonably coherent set of expectations and traditions concerning commitment that aid in the construction of a narrative identity, both for each partner and for the couple together.

This role of marriage is reflected in the fact that many gay and lesbian critics argue that denying same-sex couples the right to marry is injurious precisely because it deprives such couples of this social acknowledgment of the value of their intimate commitments. Partners in such relationships are left to their own devices in cultivating a sense of the importance of the choices they make. As one lesbian in a permanent relationship has written:

\begin{quote}
We had not had a wedding. Aunts and uncles did not come to visit and admire our
\end{quote}
home. We never received anniversary cards. As trivial as these things may seem, they represent something vitally important: heterosexual couples are encouraged to stay together. Their union is celebrated and shared with loving and supportive families and friends.\textsuperscript{109}

Lawrence Blum’s concept of “role morality” suggests the way in which marital status combines elements of personal and impersonal value.\textsuperscript{110} Those who identify with the values and ideals of a role have “a sense of personal engagement that helps to sustain the individual in her carrying out” the role’s obligations.\textsuperscript{111} This sense of engagement means that the moral pull a role exerts is experienced not simply as an external limitation on the pursuit of individual interests. Rather, it is regarded as “implicated in the individual’s own sense of personal values.”\textsuperscript{112} In this way, adherence to role morality is a form of self-realization. At the same time, those values are not purely personal ones that derive their meaning solely from their place within an individual’s set of ends. As Blum suggests, in the case of a person guided by role morality, “[t]he...agent does not take herself to be pursuing a goal simply because of its value to her. Rather, [she] takes herself to be responding to a value outside of herself, following (what she takes to be) its dictates.”\textsuperscript{113} In short, a well-defined social role such as marriage can evoke personal identification with impersonal value, meaning that spouses can find a measure of self-fulfillment from acting

\textsuperscript{111} Id. at 179.
\textsuperscript{112} Id. at 180.
\textsuperscript{113} Id. at 181.
in accordance with a general moral norm of commitment in marriage.

This is not to say that the tradition of marriage is unproblematic. In particular, of course, gender norms continue to influence many couples' understandings of what marriage entails.\(^{114}\) These norms create asymmetries of power between husbands and wives, and can leave women financially vulnerable at divorce. Neither, however, is the tradition of marriage static. The intensely companionate model of marriage so influential in our era, for instance, emerged only over the last three hundred years or so, and did so at different rates among different social classes.\(^{115}\) Many couples now aspire to, although fewer achieve, an egalitarian marriage that avoids reliance on conventional gender assumptions.\(^{116}\) To the extent that couples with such an aspiration are unsuccessful, the birth of a child likely does far more to reinforce traditional roles than does marriage \textit{per se}. Furthermore, claims for recognition of same-sex marriage have sparked a vibrant debate about just what core values marriage serves, especially in light of a looser connection between marriage and procreation.\(^{117}\) An historical perspective thus reveals that, while long-term commitment has been a relatively constant feature of marriage, perceptions of the purpose of that commitment have varied over time.

As David Chambers has suggested, were we writing on a clean slate, promoting commitment by favoring the "two-person enduring union" over other social relationships might not necessarily be the most desirable practice.\(^{118}\) As Chambers observes, however, "after thousands of years of

\(^{114}\) See generally Williams, supra note 23; E.J. Graf, What is Marriage For? (1999).


\(^{117}\) See Williams, supra note 23, at 30.

\(^{118}\) Chambers, supra note 101, at 448.
human history, the union of two persons in a relationship called ‘marriage’ is almost certainly here to stay." 119 Throughout the world “marriage is the single most significant communal ceremony of belonging.” 120 This historical resonance makes it a powerful vehicle for expressing the independent value of commitment. By entering a social institution that has endured over numerous generations, individuals orient themselves within a distinct cultural narrative in which self-realization is linked with intimate attachment.

CONCLUSION

My primary objective in this paper has been to argue that the state is justified in promoting marital commitment as a substantive good. My argument does not, however, necessarily lead to specific conclusions about particular legal provisions. I will conclude by briefly touching upon three aspects of law for which my claim may be relevant. First, I would contend that it is appropriate for the law to provide more benefits to married than to unmarried couples as one way of encouraging commitment. It is far less plausible today for unmarried couples to maintain that they avoid marriage because they desire to avoid the legal burdens the status imposes. Recent years have witnessed the demise of many legal obligations premised on marriage, the decline of provisions supporting traditional gender roles within marriage, and the increasing willingness of courts to provide for the distribution of financial assets between unmarried persons when their intimate relationship ends. 121 This makes more plausible than ever the assumption that many who do not marry avoid it because they are wary of the symbolic commitment that marriage represents. Some support for this view comes from the fact that unmarried couples break up more

119 Id.
120 Id. at 450.
frequently than married couples divorce, and that their relationships are briefer. If willingness to marry does represent greater intimate commitment, society is warranted in expressing its approval of this institution by treating married and unmarried couples differently.

I am wary of domestic partner legislation at least insofar as the benefits that it provides begin to approximate those available to married couples. Such a regime that rewards multiple models of intimacy risks diluting the influence of marriage as the preeminent social symbol of intimate commitment. It implies that commitment is a good that derives its value ultimately from individual choice, rather than from its intrinsic worth, so that varying degrees of commitment all have equal value. For same-sex couples, who cannot marry, benefits can be a humane and pragmatic way of acknowledging the importance of these relationships in a social climate that may be hostile to same-sex marriage. Ultimately, however, we should extend the ability to marry to same-sex couples whose partners wish to make a public commitment to each other. Aside from the importance of this step to gay men and lesbians, the inability to structure these marriages along gender lines would provoke healthy debate about the role and functions of marriage.

A second legal development that raises some issues relating to my theme is covenant marriage. By making it possible for spouses to agree to a more demanding standard for divorce than is currently available, law may provide the social support that individuals need to maintain a sense of the importance of marital commitment. Widespread adoption of this alternative could help reverse what some see as an attenuation of this norm. At the same time, however, covenant marriage could diminish the ability of marriage to reinforce this norm by fragmenting the clarity of the message that marriage sends. What would it mean to

say “I do” in a society in which the option to say “I really do” also is available? Would “regular” marriage be seen as a lesser commitment than covenant marriage—a sort of “marriage lite?” Might this eventually lead to default rules that reflect only a minimal norm of commitment, on the theory that those who want more can always provide for it? Such a development would reflect a move from status toward contract as the primary source of intimate commitment. Would this begin to deprive marriage of its effectiveness in conveying the sense that intimate commitment is a good with intrinsic value to human flourishing?

Finally, what about a two-tiered system of divorce, with more stringent requirements for divorcing couples with minor children than those without? The rationale for such a regime obviously stems from a concern about the impact of divorce on children, rather than about marital stability per se. As such, two-tiered divorce might be part of a shift from marital status to parental status as the organizing concept in family law. There is much to be said for greater sensitivity to the importance of a norm of marital commitment for children, and to the ineluctability of parenthood as a source of family obligation. We must be careful, however, not to conclude that the stability of marriages without children therefore is of little concern. Intimate commitment between adults is important because of its contribution to a stable sense of identity and its role in preserving individual autonomy and integrity as coherent ideals. A legal system that imposes minimal and casual standards of divorce for childless couples risks undermining preconditions for the very individuality that critics invoke in resisting the use of law to reinforce marital commitment.

Sensitivity to the value of marital commitment per se does not lead automatically to calls for specific legal provisions. It does, however, suggest a dimension to which we should be sensitive when considering legal regulation of

marriage. If marriage does indeed become less important as a conceptual foundation for family rights and obligations, we need to be aware of what we may risk losing if we treat it as but one among several coequal intimate relationships. In order to do this, we need to think deeply about why we should care about marriage at all.